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06-341 SEP 5 - 2006

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee.

Parties to the Proceedings

The parties to this proceeding include the Equal Employment Opportunity Commission ("EEOC"), a governmental agency, and BCI Coca-Cola Bottling Company of Los Angeles ("BCI"), a non-governmental corporation.

Rule 29.6 Statement

BCI Coca-Cola Bottling Company of Los Angeles is a wholly owned subsidiary of Coca-Cola Enterprises Inc., a publicly traded company. The Coca-Cola Company, a publicly traded company, owns ten percent (10%) or more of the stock of Coca-Cola Enterprises Inc.

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Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-31a) is published at 450 F.3d 476. The memorandum opinion and order of the United States District Court for the District of New Mexico (App. 32a-76a) is unpublished, but unofficially reported at 2004 WL 3426757.

Jurisdiction

The judgment of the court of appeals was entered on June 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), which provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case

I. BACKGROUND FACTS AND ISSUES

This case, which arises under Title VII of the 1964 Civil Rights Act, stems from an incident of insubordination involving an African American merchandiser, Stephen Peters, who was employed at BCI's facility in Albuquerque, New Mexico.[1] Mr. Peters reported to the local District Sales Manager ("DSM"), Cesar Grado, who is Hispanic. Mr. Grado had no authority to terminate employees, and was required to run all decisions regarding disciplinary action through BCI's Human Resources Department. (App. 35a).

Mr. Peters was scheduled to be off work on the weekend of September 29 and 30, 2001. Due to a shortage of workers, Mr. Grado ordered Mr. Peters to come to work on the weekend. Mr. Peters refused, and Mr. Grado warned him that continued refusal would be considered insubordination and could be grounds for termination. (App. 40a). Mr. Peters admitted in his deposition that he responded by saying: "You do what you have to do, and I will do what I have to do." (App. 40a). True to his word, Mr. Peters did not appear for work as ordered, and was terminated for insubordination. He later claimed he was sick, and presented evidence he had visited a walk-in clinic on Saturday, September 29, 2001. (App. 43a). The EEOC claims that Mr. Peters was a victim of race discrimination, in that white and Hispanic employees who missed work were not treated as harshly. (App. 46a).

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[1] BCI is a bottler of Coca-Cola® products. Merchandisers are hourly employees whose job duties include product placement, and cleaning, arranging, and rotation of displays and promotional materials in retail grocery outlets. (App. 33a).

The termination decision was actually made by Pat Edgar who, at the time, was a Human Resources Manager working in Phoenix but who had supervisory authority over Albuquerque. It is undisputed that Ms. Edgar did not know that Mr. Peters was African American when she made the termination decision. (App. 9a). She based her decision in part, but not exclusively, on Mr. Grado's account of Mr. Peter's statements and actions. Ms. Edgar never spoke to Mr. Peters prior to the termination; however, she did pull Mr. Peters' personnel file, discovering an unrelated but similar incident of insubordination two years before, including a final warning, which also contributed to her decision to terminate. The prior incident of insubordination did not involve Mr. Grado. (App. 42a-43a).

Contrary to the EEOC's characterization of the incident, Mr. Grado did not initially contact Ms. Edgar in order to report Mr. Peters' insubordination. Rather, he contacted Ms. Edgar, before he ever contacted Mr. Peters, for advice on handling the possibility that Mr. Peters would refuse to work on the weekend (which in fact occurred). Thus, Ms. Edgar was involved in advising Mr. Grado while the incident was unfolding. Ms. Edgar walked Mr. Grado through the exact statements to make and instructions to give to Mr. Peters, and it is undisputed that Mr. Grado followed Ms. Edgar's directions. It is also undisputed that Mr. Grado was never asked for his opinion as to what should happen to Mr. Peters based on his refusal to work, never recommended termination, and, in fact, never made any comments or suggestions at all other than asking Ms. Edgar's advice on how to handle the situation and reporting to her what had occurred. (App. 44a).

The EEOC argued that a subordinate bias theory of liability (sometimes referred to as "cat's paw" or "rubber

stamp" liability)[2] should apply, because the termination decision, though made by Ms. Edgar, was supposedly influenced by racial bias on the part of Mr. Grado. The EEOC presented some rather vague and conclusory declarations from former, disgruntled employees, indicating that Mr. Grado previously treated other African Americans worse than white or Hispanic employees, and made racially disparaging remarks towards African Americans. (App. 46a – 47a). The EEOC claimed that Mr. Grado, though he never expressly recommended or even mentioned termination, presented Ms. Edgar with a distorted version of what occurred with Mr. Peters, resulting in his termination.

II. DECISION OF THE DISTRICT COURT

The District Court granted summary judgment in favor of BCI, dismissing the case in its entirety. (App. 76a). The district court found that there was no question that Mr. Peters' conduct (most significantly, his undisputed admonition to Mr. Grado to "do what you have to do") was insubordination warranting termination (App. 58a), and that Ms. Edgar had no idea Mr. Peters was African American when she made the termination decision. (App. 69a-71a). The district court also

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[2] The "cat's paw" doctrine derives its name from a fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. Courts typically use "cat's paw" language to refer to a situation in which a biased subordinate who lacks decision making power uses the formal decision maker as a dupe to carry out a discriminatory employment action. (App. 14a). The "rubber stamp" doctrine refers to a situation in which a decision maker gives perfunctory approval for an adverse employment action initiated or recommended by a biased subordinate. (App. 15a). Judge Posner is believed to have been the first to use the descriptor "cat's paw" for this category of claim. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

found that, while there was sufficient evidence to conclude that Mr. Grado was racially biased (App. 71a) (a decision with which BCI disagrees), there was insufficient evidence of influence by Mr. Grado on the termination decision to warrant application of a subordinate bias theory of liability. (App. 66a-67a,71a). The court pointed to the fact that Mr. Grado never made any recommendation to Ms. Edgar as to what should happen to Mr. Peters, and to the fact that Ms. Edgar independently researched Mr. Peters' employment history prior to making the termination decision. (App. 66a-67a,71a).

III. DECISION OF THE TENTH CIRCUIT

The Tenth Circuit reversed the order of summary judgment, holding that the district court misapplied the subordinate bias theory of liability because it placed too much emphasis on the fact that Mr. Grado made no express recommendation to terminate Mr. Grado. (App. 21a-22a). The Court expressly rejected the notion that a plaintiff must show that a decisionmaker followed the recommendation of a biased subordinate in order to prevail under a subordinate bias theory of liability, thereby effectively overruling a prior Tenth Circuit decision addressing this issue. *See English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001).

The Court also ruled that Ms. Edgar's independent investigation of the report received from Mr. Grado--namely, looking at Mr. Peters' personnel file including his prior history of insubordination—was insufficient, as a matter of law, to defeat the inference that Mr. Grado's racial bias tainted her decision. (App. 30a-31a). The Court implied that direct contact by the decisionmaker with the accused employee is an essential requirement for a true "independent

investigation" sufficient to negate subordinate bias liability. (App. 30a-31a). The Court acknowledged that Mr. Peters telling Mr. Grado to "do what you have to do" was undeniably insubordinate, but focused on discrepancies (which BCI contended were immaterial) between Mr. Grado's and Mr. Peter's accounts of events leading to the termination, pointing out that only Mr. Grado's version of events was relayed to Ms. Edgar. (App. 28a-30a). The Court held that whether or not Mr. Grado's supposed bias was a factor in the termination decision was for a jury to decide, and remanded the case for trial. (App. 31a).

REASONS FOR GRANTING THE PETITION

BCI respectfully submits that there are two reasons why this Court should grant its petition for writ of certiorari and review the Tenth Circuit's decision. First, as the Tenth Circuit and other courts have recognized, there is a distinct split of opinion among the circuit courts of appeal as to the proper standard for applying subordinate bias liability, or the so-called "cat's paw" theory of liability, under Title VII. Second, the Tenth Circuit's ruling hinges upon an important question of federal employment law that has not been, but should be, settled by the Supreme Court: namely, under what circumstances may an employer be held liable for intentional discrimination when the person who made the adverse employment decision admittedly harbored no discriminatory bias toward the impacted employee.

I. THE CIRCUITS ARE SPLIT

Judge Posner of the Seventh Circuit is believed to have been the first to use the descriptor "cat's paw" to label the doctrine of employer liability based upon the motivations of a biased subordinate. *See Shager*, 913 F.2d at 405. The

circuit courts of appeal that have subsequently considered the issue of subordinate bias liability have generally embraced the concept that an employer's culpability for an adverse employment decision may sometimes extend beyond the motivations of the official decisionmaker. *See, e.g., Gee v. Principi*, 289 F.3d 342, 345-47 (5th Cir. 2002); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 876-78 (6th Cir.), *reh'g denied*, 266 F.3d 407 (2001); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 285-86 (3d Cir. 2001); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001); *Rios v. Rossotti*, 252 F.3d 375, 381-82 (5th Cir. 2001); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-28 (5th Cir. 2000); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249-50 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1310-11 (D.C. Cir. 1998); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 752 (7th Cir. 1998); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 514-15 (3d Cir. 1997), *cert. denied*, 523 U.S. 674 (1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1325 (8th Cir. 1994). As expressly acknowledged by the Tenth Circuit, however, there has been much confusion, disagreement, and outright debate over both the appropriate analytical framework for such a theory of

liability, and the facts that a plaintiff must show to permit it to be applied.

A. There is an Acknowledged Split Among the Tenth/Seventh, Fifth, and Fourth Circuit Courts of Appeal With Respect to Subordinate Bias Liability

Prior to the Tenth Circuit's decision in this case, the most fully fleshed-out analyses of the subordinate bias theory of liability were found in decisions from the Seventh, Fourth, and Fifth Circuits, none of which utilized the same standards or approach in applying the theory. *Compare Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005), *with Russell*, 235 F.3d at 219, *with Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004). Before setting forth its own analysis, the Tenth Circuit expressly acknowledged this split of authority:

> Despite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision.

(App. 18a)

The Tenth Circuit then presented its own characterization of the split, first recognizing what it described as a "lenient" approach, currently followed by the Fifth Circuit, wherein a plaintiff is merely required to demonstrate some "influence" over the titular decision maker in order to prevail on a theory of subordinate bias liability. (App. 18a-19a) (*citing Russell*, 235 F.3d at 227). Under this view

> summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.

(App. 19a) (*quoting Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994)). The Tenth Circuit rejected this "lenient" approach, observing that "[s]uch a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation." *Id.*

The Tenth Circuit next discussed the approach set forth in *Hill*, 354 F.3d at 277, in which the Fourth Circuit held that

> to survive summary judgment, an aggrieved employee who rests a discrimination claim...upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker of the employer.

Id. at 291. In *Hill*, the Fourth Circuit ruled that an employer cannot be held liable unless this standard is met, even if there is evidence the biased subordinate exercised "substantial influence" or played a "significant" role in the employment decision. *Id.* at 289. The Tenth Circuit rejected the Fourth Circuit's standard as being so strict as to undermine the deterrent effect of subordinate bias claims. (App. 20a).

After characterizing the Fifth and Fourth circuits as being at "opposite extreme[s]" on the issue of subordinate bias liability (App. 19a), the Tenth Circuit announced it was aligning itself with the Seventh Circuit, which, while expressly rejecting the "actual decision maker" standard set forth by the Fourth Circuit in *Hill*, also requires the plaintiff to establish more than mere "influence" or "input" in the decisionmaking process in order to prevail on a claim based on subordinate bias. (App. 20a-21a) (*citing Lust*, 383 F.3d at 584 (Posner, J.)). The Tenth Circuit thus embraced what might be described as the "causation" standard of subordinate bias liability, an approach that requires the plaintiff to establish a causal link between the subordinate's bias and the adverse employment decision. *Id.* at 488.

The Tenth Circuit is not the first court to wrestle with intra-circuit confusion, disagreement, and conflicting precedent on the issue of subordinate bias liability, nor is it the first court to observe the extra-jurisdictional conflict among the circuits on how this theory is articulated and applied. In the *Hill* decision, for instance, a divided Fourth Circuit panel initially reversed an award of summary judgment to the employer, applying a theory of subordinate bias liability based on the "substantial influence" standard applied by the Fifth Circuit. *See* Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, No. 03-1443, 2004 WL 838126 at *4 ("*Hill* Petition"). The dissenting panel member maintained that an employer could be held liable only if there was a discriminatory purpose on the part of the "actual decisionmaker." *Id.* at *4-5. The Fourth Circuit reheard the case *en banc*, voting 7-4 to vacate the panel opinion and reinstate the award of summary judgment. *Id.* at 5.

Like the Tenth Circuit, the Fourth Circuit in *Hill* expressly acknowledged the split of opinion on this issue, observing that "while the courts often utilize the same terminology...they have not always described the theory in a consistent way...." *Hill*, 354 F.3d at 290. The *en banc* majority opinion in *Hill* frankly recognized that its holding conflicted with the Fifth Circuit's decision in *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003), which held that "the relevant inquiry is whether the supervisor harboring a discriminatory animus had 'influence or leverage over' the decisionmaking of those 'principally responsible' for the adverse employment actions." *Hill*, 354 F.3d at 290 (*quoting Laxton*, 333 F.3d at 584). The dissent in *Hill* also acknowledged the split, noting that the majority's decision "puts us at odds with virtually every other circuit..." *Id.* at 299.

The Seventh Circuit (specifically, Judge Posner, revisiting the "cat's paw" theory of liability which he inaugurated fourteen years prior) has also expressly acknowledged the split of authority on this issue, stating that the rationale set forth by the Fourth Circuit in *Hill* is "not the view of this court." *Lust*, 383 F.3d at 584. Judge Posner pointedly criticized the *Hill* court for applying what he characterized as an overly literal reading of his earlier opinion in *Shager*:

> The [cat's paw] formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation.

Id. As is readily apparent from Judge Posner's comments, as well as the conflicting commentary and analysis set forth in

the *Hill* case and the case at bar, the issue of subordinate bias liability presents a pronounced divergence of opinion, ripe for resolution by this Court.

B. The Tenth and Fourth Circuit Courts of Appeal are in Conflict over the Proper Application of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), in the Area of Subordinate Bias Liability

In articulating their contradictory standards for subordinate bias liability, the Fourth and Tenth Circuits based their holdings, in part, on this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). In *Reeves*, this Court reinstated a jury verdict for a plaintiff, finding that he had produced sufficient evidence of age discrimination. This evidence included testimony that Powe Chestnut, the director of manufacturing (and the company president's husband) harbored age animus against the plaintiff. *Id.* at 151. Although the president, Sandra Sanderson, made the decision to terminate plaintiff's employment, this Court acknowledged plaintiff's "evidence that Chestnut was motivated by age-based animus and was *principally responsible* for [plaintiff's] firing." *Id.* (emphasis added). The Court also noted plaintiff's evidence that "Chestnut was the *actual decisionmaker* behind his firing" even though it was Sanderson "who made the formal decision to discharge [plaintiff]." *Id.* at 152 (emphasis added).

Relying upon this language in *Reeves*, the Fourth Circuit stated that:

> *Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the "formal decisionmaker" to

> impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one "principally responsible" for, or the "actual decisionmaker" behind, the action.

Hill, 354 F.3d at 288-89. The Fourth Circuit rejected the argument that this language in *Reeves* "does not define the outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer." *Id.* at 289. Rather, the court embraced the *Reeves* language, and further noted that "the Court's clear emphasis upon who holds the 'actual decisionmaking' power and authority or who has 'principal responsibility' for an employment decision is consistent with the limitations set forth in [*Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1998)]." *Id.*

In adopting a different standard than *Hill*, the Tenth Circuit expressly rejected *Hill*'s reliance upon *Reeves*. In a clear contradiction of opinion, the Tenth Circuit stated that "[t]he Fourth Circuit's strict approach makes too much of the phrase 'actual decisionmaker' in *Reeves*; the Court was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." (App. 20a). Finding the *Hill* court's reliance upon *Reeves* "peculiar," *id.*, the Tenth Circuit stated bluntly that the Fourth Circuit's "focus on 'who is a decisionmaker' for purposes of discrimination actions seems misplaced." *Id.* (citation omitted). Moreover, while the Fourth Circuit found its standard consistent with this Court's agency analysis in *Ellerth*, the Tenth Circuit found just the opposite. *Compare Hill*, 354 F.3d at 289 *with* App. 20a.

The circuit split over the appropriate standard for subordinate bias liability, therefore, includes a circuit split over the proper application of this Court's holdings and findings in *Reeves*. This circuit split further supports BCI's petition for review as this case will present the opportunity for this Court to rule upon how its findings in *Reeves* affect and control the contours of subordinate bias liability.

C. Other Circuit Courts of Appeal Apply Different Standards of Subordinate Bias Liability

The current stand-off among the Tenth/Seventh, Fifth, and Fourth circuits on the appropriate standard for application of subordinate bias liability is only the latest permutation of a shifting but longstanding discord among the circuits (and even within circuits) regarding this issue. *See, e.g, Hill* Petition, *9-19 (gathering and summarizing cases applying various theories of subordinate bias liability). Over the years, courts have widely differed on the level of influence that an allegedly biased subordinate or supervisor must have on the ultimate decisionmaker, and the level of involvement the subordinate must have in the decisionmaking process, before liability will be imposed on the employer.

A prime example of this divergence of opinion is presented by the case at bar, where the Tenth Circuit announced and applied a standard that conflicts with its prior precedent. Specifically, the court stated that, under its chosen standard for application of a theory of subordinate bias liability, an employer may be liable even if the biased subordinate never expressly recommended termination. (App. 21a-22a). Indeed, the Tenth Circuit held that the trier of fact might conclude that Mr. Grado caused Mr. Peters' termination, despite the fact that Mr. Grado admittedly made no comments or suggestions at all regarding what should

happen to Mr. Peters.[3] In so doing, the Tenth Circuit effectively overruled circuit precedent, which required that a claimant "must show that the decisionmaker 'followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee.'" *See English*, 248 F.3d at 1011. By altering its position on the requirement of a recommendation, the Tenth Circuit not only contradicted (without expressly overruling) its precedent, but also placed itself in opposition to numerous cases clearly indicating that, in order for subordinate bias liability to apply, a subordinate must assert more overt influence over the decisionmaker and/or play a more proactive role in instigating or orchestrating the employment decision than occurred in the case at bar. *See, e.g., Russell*, 235 F.3d at 221 (finding that plaintiff's fellow-manager substantially influenced the termination decision of upper-level management, when he gave his boss the ultimatum that he would quit if she did not fire the plaintiff); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (stating that plaintiff's direct supervisor substantially influenced the termination where he had repeated "daily conference calls" with regional manager regarding plaintiff, and was asked for his opinion regarding plaintiff's dismissal).

The Sixth Circuit has also offered varying standards. In a 1998 case, the court stated that "remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless *played a meaningful role* in the decision to terminate the plaintiff, were relevant." *Ercegovich*, 154 F.3d

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[3] Even assuming Mr. Grado harbored a racial bias, the EEOC failed to present any evidence demonstrating that Mr. Grado, who was short-staffed and desperately seeking workers to cover shifts, wanted Mr. Peters to be terminated. (App. 38a-39a).

at 354-55 (emphasis added). Three years later, however, the court ignored *Ercegovich*'s "meaningful role" standard and stated that "the plaintiff must offer evidence that the supervisor's racial animus was the cause of the termination or *somehow influenced* the ultimate decisionmaker." *Christian*, 252 F.3d at 877 (emphasis added).

Whereas the Sixth Circuit maintains the different standards of a subordinate's level of involvement —"meaningful role" vs. "somehow influenced"— the Ninth Circuit applies a more lenient standard than either of the Sixth Circuit standards, requiring that the subordinate merely be "involved" in (as opposed to have actually influenced) the decision. *See Bergene*, 272 F.3d at 1141 (stating that, "[e]ven if a manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager *was involved* in the hiring decision"). The Eighth Circuit, on the other hand, describes its standard in terms of whether the subordinate used the ultimate decisionmaker as a conduit and actually acted to set the plaintiff up to fail. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993); *Stacks*, 27 F.3d at 1316.

Some circuit courts of appeal simply state that liability will be imposed if there is evidence that the biased subordinate merely "influenced" the ultimate decisionmaker. The First Circuit, for example, stated that, in order to prove that the employer's reason for the adverse action was a pretext for discrimination, the employee need only "show that discriminatory comments were made by the key decisionmaker or *those in a position to influence the decisionmaker*." *Santiago-Ramos,* 217 F.3d at 55 (emphasis added). The Third Circuit described the standard differently, stating that, "[ū]nder our case law, it is sufficient if those exhibiting discriminatory animus *influenced or participated in*

the decision to terminate." *Abramson*, 260 F.3d at 286 (Alito, J., participating) (emphasis added).[4]

The level of influence that must be exerted by a biased subordinate in order to impose liability on the employer is higher in the Eleventh Circuit. In that circuit, liability will be imposed where the biased subordinate actually "*is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for the harasser's discriminatory animus." *Llampallas*, 163 F.3d at 1249 (emphasis in original). *See also Wascura*, 257 F3d at 1247 (indicating that the biased subordinate must be a "dominant decision-maker whose decision was rubber-stamped by others"). The District of Columbia Circuit has spoken in reverse terminology, "holding that evidence of subordinate bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin*, 142 F.3d at 1312 (Ginsburg, J.).

As these decisions reveal, there existed intercircuit and intracircuit disagreement over the appropriate standard long before the issue ripened over the last two years in *Hill*, *Lust*, *Russell*, and (now) *BCI*. In short, there is a longstanding, expressly acknowledged circuit split with respect to the determinative issue in this case, bringing this matter squarely within the ambit of this Court's discretionary jurisdiction.

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[4] The Third Circuit cited, among other cases, the D.C. Circuit's 1998 decision, authored by then-Judge Ginsburg, wherein the court held that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin*, 142 F.3d at 1312 (Ginsburg, J.).

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The ultimate question in any employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination. *Reeves*, 530 U.S. at 153. This ultimate question is at the heart of the matter that was presented to the Tenth Circuit in this case: Based on the undisputed facts, could a reasonable trier of fact conclude that Mr. Peters was subjected to intentional discrimination on the basis of his race? It is clear that the answer to this question would have been different if the matter had arisen in the Fourth Circuit. Indeed, the case might have turned out very differently even under the supposedly "lenient" standard applied in the Fifth Circuit, where in *Russell*, the Fifth Circuit found that a theory of subordinate bias liability was applicable in a case where the influence exercised by the subordinate over the decisionmaking process far exceeded the supposed "influence" exerted by Mr. Grado over Ms. Edgar. *See Russell*, 235 F.3d at 228 (observing that the allegedly biased subordinate exerted so much influence over the decisionmaker that she "essentially regarded her decision to terminate [the employee] as ordained by other forces"). In fact, the case might have turned out differently in any circuit, even the Tenth Circuit, depending upon the predilections of the panel regarding which of the various available standards to apply. Such indirection and ambiguity in the law severely undermine the best efforts of multi-jurisdictional employers such as BCI to comply with Title VII and other anti-discrimination laws.

In the realities of today's workplace, ultimate decisions are frequently made by decisionmakers who are at some level removed from employees and who must rely to varying

degrees on information received from subordinates. Indeed, the practice utilized by BCI in this case, of elevating the decision at issue to trained Human Resources personnel, is inarguably a deterrent against discrimination, as it provides for consistent application of policies and neutrality in decisionmaking. Are employers such as BCI best advised to eschew such centralized decisionmaking, either entirely, or in certain areas, depending upon the prevailing judicial views in its various operational divisions? As the Tenth Circuit suggests, is someone in Ms. Edgar's position required to have direct contact with the employee at issue in every instance, in order to avoid a claim based upon subordinate bias liability? And if that is the case, does that mean it is now appropriate, in contradiction to the overwhelming weight of prior authority,[5] for courts to act as "super personnel department(s)" dictating in minute detail the practices of employers? All of these extremely important and timely questions underlie the issue presented for review, and make this case an excellent vehicle for the Court to provide much-needed guidance to employers, employees, the EEOC, and all interested parties, regarding these matters.

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[5] The following cases state that courts may not act as a "super personnel departments" that second guess employers' business judgments: *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197 (10th Cir. 2006) (quoting *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Serv.*, 165 F.3d 1321, 1330 (10th Cir. 1999)); *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (6th Cir. 2006); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002), *cert. denied*, 537 U.S. 884 (2002); *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006).

The issue presented for review undeniably has a far-reaching impact, applying to all employers covered by federal anti-discrimination laws, including Title VII, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[6] *Christian*, 252 F.3d at 868; *Hill*, 354 F.3d at 283-84, 286-87. Moreover, parties on all sides of the issue agree both as to the importance of the issue and the need for guidance—as the Court will recall, the unsuccessful plaintiff in the *Hill* case petitioned this Court for review of this very issue in 2004.[7] *See Hill* Petition, 2004 WL 838126. In fact, the Court invited the Solicitor General to submit a brief addressing the issue of subordinate bias liability, prior to the petitioner's voluntary withdrawal of the petition in *Hill*. BCI is hopeful the Court will seize upon this renewed opportunity to articulate a reasonable, universal standard for application of the subordinate bias theory of liability.

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[6] This Court's review of this issue will also have an impact on state anti-discrimination laws, as state courts frequently look to federal law for guidance when applying their own state anti-discrimination statutes. *See, e.g., Ocana v. American Furniture Co.*, 91 P.3d 58, 68 (N.M. 2004) (applying New Mexico law); *Christian*, 252 F.3d at 880 (applying Ohio law); *Beason v. United Tech. Corp.*, 337 F.3d 271, 276 (2d Cir. 2003) (applying Connecticut law); *LaBove v. Raftery*, 802 So. 2d 566, 573 (La. 2001) (applying Louisiana law).

[7] The EEOC has gone on record opining about the importance of the issue of subordinate bias liability, filing an amicus brief with the Fourth Circuit in the *Hill* case.

CONCLUSION

For all of the reasons set forth above, BCI Coca-Cola Bottling Company of Los Angeles respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-2220

[Filed June 7, 2006]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellant*,	)
v.	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, doing business as Phoenix Coca-Cola Bottling Company; COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, *Defendants-Appellees*.	)

ORDER

BEFORE: LUCERO, McKAY, and McCONNELL, Circuit Judges.

The Equal Employment Opportunity Commission ("EEOC") asks us to reverse the district court's decision

granting summary judgment to BCI Coca-Cola Bottling Co. of Los Angeles ("BCI") on a claim of race discrimination arising from the termination of a black employee, Stephen Peters. It is undisputed that the human resources official who made the decision to terminate Mr. Peters worked in a different city, had never met Mr. Peters, and did not even know that he was black. In making the decision to terminate, however, the human resources official relied exclusively on information provided by Mr. Peters' immediate supervisor, who not only knew Mr. Peters' race but allegedly had a history of treating black employees unfavorably and making disparaging racial remarks in the workplace. Because we find that genuine issues of material fact exist as to whether BCI's proffered explanation for the termination is a pretext for racial discrimination, we reverse the decision of the district court and remand for further proceedings.

I. Factual and Procedural Background

Stephen Peters worked as a merchandiser for BCI at its Albuquerque, New Mexico facility from May 1995 through October 2001. More than 60% of the 200 employees at the Albuquerque facility were Hispanic, while fewer than 2% were black. Merchandisers are hourly employees responsible for placement of Coca-Cola products in retail outlets such as grocery stores. Their job duties include arranging, cleaning, and rotating product displays and promotional materials. They generally work five days a week, with two days off, but because grocery stores remain open seven days a week, merchandisers' schedules are staggered and they must occasionally work overtime to cover shifts. As the most senior merchandiser in the district, Mr. Peters had the most desirable schedule, with Saturdays and Sundays off. He was generally regarded as a "good merchandiser," and in 2001 he received a certificate from BCI thanking him for five years of

"service, dedication and commitment to the Company." App. 143, 151. The certificate specifically thanked him for "being a team player." *Id.* at 151.

Mr. Peters reported to Cesar Grado, a District Sales Manager, who is Hispanic. On a day-to-day basis, Mr. Peters was supervised by a salaried Account Manager, Jeff Katt, who is white. Although both Mr. Katt and Mr. Peters both reported directly to Mr. Grado, who handled all scheduling and route assignments for merchandisers and account managers in his district, it was common for merchandisers to call in sick to the account manager who supervised their work. Mr. Grado was responsible for monitoring and evaluating the employees under his supervision, but was not authorized to discipline or terminate anyone. Instead, Mr. Grado had broad discretion to "bring facts relating to the matter to the attention of [the] Human Resources Department," which was ultimately responsible for deciding which company policy applied and whether to take any disciplinary action. App. 34. The highest-ranking human resources official in the Albuquerque office was Sherry Pederson. Ms. Pederson's supervisor, Pat Edgar, worked 450 miles away in BCI's Phoenix, Arizona office. Neither Ms. Pederson nor Ms. Edgar had met or even heard of Mr. Peters until September 28, 2001, four days before his termination.

The weekend of September 29-30, 2001, Mr. Grado faced a serious scheduling crunch. Several stores in his district were running ads for Coca-Cola products, necessitating an extra merchandiser for the weekend, and on the morning of Friday, September 28 he learned that another merchandiser who ordinarily worked as a "floater" to cover extra shifts had suffered an on-the-job injury and would be out for a week. Sometime between midday and 2:00 pm on Friday, Mr.

Grado directed Mr. Katt to direct Mr. Peters to work on Sunday, September 30.[1] When Mr. Katt relayed the instruction, Mr. Peters responded, "I can't do it. I've got plans." *Id.* at 67. According to Mr. Grado, when Mr. Katt recounted the conversation he added that Mr. Peters said he "might call in sick." *Id.* at 35. Both Mr. Peters and Mr. Katt, however, deny that Mr. Peters said anything about being sick during that conversation, and Mr. Katt denies passing along any such comment to Mr. Grado.

Frustrated, Mr. Grado decided to seek advice from the Human Resources Department. Ms. Pederson was out of the office on Friday afternoon, so Mr. Grado called Ms. Edgar in Phoenix. Mr. Grado said that he expected Mr. Peters was going to refuse to come to work on Sunday, and asked whether he could require Mr. Peters to come in on his day off. Specifically, he told Ms. Edgar that Mr. Peters planned to call in sick on Sunday. Ms. Edgar found that prospect "unacceptable" because, under BCI policy, an employee may not call in sick two days in advance. *Id.* at 23. She advised Mr. Grado to "find out what the situation was" and, unless Mr. Peters had a "compelling reason" why he could not come to work, to order Mr. Peters to work on Sunday. *Id.* She told Mr. Grado to characterize the instruction as a "direct order" and to say that failure to comply would amount to insubordination, which is grounds for termination. *Id.*

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[1] In his declaration, Mr. Grado stated that he had already discussed the matter with Mr. Katt and Mr. Peters had already agreed to work on Sunday, September 30. It is unclear, then, why he contacted Mr. Katt to order Mr. Peters yet again to work that day. In any case, Mr. Katt denies that Mr. Grado ever contacted him before Friday at 2:00 concerning the possibility that Mr. Peters might work on Sunday.

Mr. Grado then paged Mr. Peters, who called immediately. Mr. Grado ordered Mr. Peters to work on Sunday, and Mr. Peters responded that he had plans.. Mr. Grado says that he asked Mr. Peters what his plans were, but that Mr. Peters angrily responded that his plans were "none of [Mr. Grado's] business," and started yelling. Mr. Peters says that Mr. Grado never asked his plans; instead, he simply told Mr. Grado that he had plans and that he had not been feeling well all week. They both agree, however, that Mr. Grado said, "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." *Id.* at 58. They also agree that the conversation ended with Mr. Peters telling Mr. Grado, "[D]o what [you] got to do and I'll do what I got to do." *Id.* Mr. Peters claims that he intended this statement as a way to end the conversation without a confrontation. Mr. Grado interpreted it as open defiance, and a firm intention to disobey the order to come to work on Sunday.

Late in the afternoon on Friday, Mr. Grado again contacted Ms. Edgar in Phoenix. He related "exactly what had happened": that he had asked Mr. Peters to describe his plans, but that Mr. Peters had refused to say what his plans were, had angrily said his plans were "none of [Mr. Grado's] business," and had told Mr. Grado to "do what he needed to do." *Id.* at 24, 65. Ms. Edgar determined at that time that Mr. Peters' conduct in that conversation, standing alone, amounted to insubordination warranting termination. Nonetheless, because it was late in the day on Friday, she did not make the decision to terminate Mr. Peters that day.

In fact Mr. Peters was sick. On the evening of Saturday, September 29 he cancelled his plans for Sunday and went to an urgent care clinic, complaining of a headache, sinus pain,

and cough. A doctor diagnosed him with a sinus infection, gave him a prescription, and directed him not to return to work until Monday, October 1. That night Mr. Peters phoned Mr. Katt and explained that he had just come from the doctor's office and probably could not work Sunday because of illness. Mr. Katt "said he didn't have any problem with that," but asked Mr. Peters to call in the morning if he felt well enough to work. *Id.* at 197. After hanging up, Mr. Katt repeatedly tried to page Mr. Grado to describe the conversation, but for some reason Mr. Grado never responded to the pages.

Mr. Peters did not work on Sunday, September 30. Mr. Katt and Mr. Grado personally worked routes that day to ensure coverage. Mr. Peters returned to work as usual on Monday morning.

On Monday, October 1, Ms. Edgar held a series of phone calls with Ms. Pederson (who was back in the office) and Mr. Grado concerning Mr. Peters' conduct. Mr. Grado explained that Mr. Peters had not come to work on Sunday. Also, Ms. Pederson pulled Mr. Peters' file and found a Disciplinary Status Notice describing an incident in 1999 where Mr. Peters received a two-day disciplinary suspension and "final warning" for insubordination from a different supervisor. During that incident, the supervisor had called Mr. Peters on a Friday morning and ordered him to work on his day off that weekend. Mr. Peters refused and, according to the status notice, "was rude and unprofessional in his conduct." *Id.* at 53. He was warned that "[a]ll Coca-Cola employees must... follow direct orders from their supervisors. Failure to comply is considered a direct act of insubordination.... subject to disciplinary action up to and including termination." *Id.* at 54. Although Ms. Edgar did not know it, because the file provides no further details, Mr. Peters had

good reason to be upset during the 1999 incident. He had learned earlier that week that his fiancee's son -- whom he had raised as his own son for years -- had been killed in a car accident. He could not work that Saturday because he had to serve as a pallbearer at the funeral. His supervisor told him that the funeral was no excuse for refusing a direct order because "he was not your biological son." *Id.* at 147.

By the end of the day on Monday, Ms. Edgar made a final decision to terminate Mr. Peters for insubordination. In a declaration prepared as part of this litigation in 2004, Ms. Edgar said that her decision was based "[f]irst and foremost" on "the conduct of Mr. Peters toward Mr. Grado on Friday." *Id.* at 26. The 1999 incident from the file reinforced for Ms. Edgar that Mr. Peters had a track record of insubordination, and also contributed to the decision. She emphasized that "Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday... as the fulfillment of Mr. Peters [sic] stated intention to defy a direct order from Mr. Grado." *Id.* at 27. Ms. Edgar claims that she had already learned, in a conversation with Mr. Grado, that Mr. Peters had been excused by Mr. Katt from work on Sunday, but that this information did not affect her decision. She found Mr. Peters' "alleged sickness" to be "highly suspect," and "found it particularly suspicious that Mr. Peters chose to call in sick to Mr. Katt, rather than Mr. Grado, given the fact that Mr. Peters had been warned by Mr. Grado the day before that if he did not come to work he would be subject to termination." *Id.* at 27.

Mr. Katt's deposition provides a different account of these events. Mr. Katt says that he did not tell Mr. Grado that Mr. Peters phoned in sick until Monday evening at 6:00 pm, during a discussion of the upcoming week's schedule. Mr.

Katt asked which route Mr. Peters was going to cover, and Mr. Grado replied, "I think I'm going to terminate him." *Id.* at 203. Mr. Katt asked, "You do know he called in, he called in sick to me?" *Id.* at 204. Mr. Grado "kind of paused" and asked, "Why didn't you tell me that earlier?" *Id.* Mr. Katt replied, "I did. I tried to page you." *Id.* According to Mr. Katt, this exchange took place Monday evening, after Ms. Edgar already made her decision to terminate Mr. Peters.

Mr. Peters was terminated Tuesday morning, October 2, at a meeting attended by Mr. Peters, Mr. Grado, Mr. Grado's supervisor Don Bateluna, and Ms. Peterson. Mr. Grado began the discussion by announcing, "You've been terminated for insubordination, for not showing up for work." *Id.* at 193. Mr. Peters was promptly presented with a termination paper. That document said nothing about Mr. Peters raising his voice or refusing to explain his plans during the phone conversation on Friday. Instead, the notice states that Mr. Peters had been given a direct order to work on Sunday, and had been warned that "failure to comply with the directive would be considered insubordination and would result in termination." *Id.* at 41. It concludes, "You did not report to work on Sunday 9-30-01, therefore your employment in [sic] being terminated for insubordination." *Id.* The "violation date" listed is Sunday, September 30, the day Mr. Peters was supposed to come to work, not Friday, September 28, the day of the conversation with Mr. Grado. *Id.*

Mr. Peters explained that he had not reported to work because he was sick. He said that he had called Mr. Katt and had received permission to miss work that day "because I went to the doctor." *Id.* at 193. He protested that "[n]either one of [you] asked me why I didn't show up for work." *Id.* Mr. Peters says that after he told them about the call to Mr.

Katt, "they all got quiet. And when I left they shut the door and was [sic] in there talking." *Id.*

Shortly after that meeting, Ms. Pederson called Ms. Edgar and asked whether she knew Mr. Peters was black. Neither Ms. Pederson nor Ms. Edgar had ever met Mr. Peters, and neither knew that he was black until the meeting on Tuesday morning. Apparently Ms. Pederson's inspection of the file was so cursory that she did not even learn basic information such as Mr. Peters' race -- which was noted on several documents in his personnel file -- even as she was taking steps toward terminating him. Ms. Edgar maintains that "[r]ace played no part whatsoever in my decision to terminate the employment of Stephen Peters." *Id.* at 28. Indeed, part of her job as a human resources official was to conduct affirmative action and equal employment opportunity training sessions for BCI management.

On October 11, 2001, Mr. Peters filed a charge with the EEOC alleging that his termination was the result of racial discrimination. The EEOC filed suit on his behalf in federal court on December 30, 2002. Its theory was that, even if Ms. Edgar was the sole decisionmaker and she did not know that Mr. Peters was black, "Grado harbored racial animus toward African American employees and... this bias was properly imputed to BCI because of Grado's substantial involvement in the termination process as Peters' supervisor and Edgar's sole source of information about the events on which BCI alleges the termination was primarily based." Aplt. Br. 12. Relying principally on cases from other circuits, the EEOC characterized this claim as arising under a "cat's paw" or "rubber stamp" theory, whereby an employer may be liable for the acts of a biased subordinate, even if that subordinate is not the formal decisionmaker.

In support of its allegations concerning Mr. Grado's racial bias, the EEOC presented affidavits from a number of other BCI employees. Three other merchandisers who worked under the supervision of Mr. Grado--two black and one Hispanic -- stated that Mr. Grado treated black employees worse than employees of other races. App. 181 (affidavit of James Young) ("African American employees were treated worse by Cesar Grado as compared to non-African American employees."); *id.* at 183 (affidavit of Bryan Esquibel) ("If Grado did not like you, he treated you badly; but African American employees were treated even worse."); *id.* at 185 (affidavit of Michael Wilson) ("It is my belief that Cesar Grado dislikes African Americans based on his treatment of me during my employment at [BCI]."). All three cited specific examples of incidents in which Mr. Grado subjected black employees to greater scrutiny and more serious discipline than Hispanic employees. Mr. Wilson, who is black, says that Mr. Grado "continually demeaned me and threatened to replace me" but always "treated Hispanic Merchandisers with respect." *Id.* at 185.

Mr. Wilson also "recall[ed] many race-based remarks made to me by Cesar Grado during work hours." *Id.* at 184. According to Mr. Wilson, Mr. Grado told jokes about black men dating Anglo women, and stated that "Black guys [do] not look good in trucks, they should drive Cadillacs." *Id.* at 185. One day, while watching Mr. Wilson clean an outdoor vending machine during the winter, Mr. Grado urged him to hurry because "brothers don't like the cold." *Id.* (internal quotation marks omitted). Also, Mr. Katt says that after the termination, during a drive to a work site, Mr. Grado asked, "Did you hear Steve is trying to sue me?" *Id.* at 212. Although he is less than "100 percent clear" about his recollection of the conversation, Mr. Katt says that Mr. Grado may have used the word "nigger" or a comparable

racial epithet to describe Mr. Peters during that conversation. *Id.*

The EEOC also compared Mr. Grado's treatment of Mr. Peters with his treatment of Hispanic employees under similar circumstances. On one occasion, for example, Mr. Grado was short merchandisers during a busy weekend, so he directed Mr. Katt to direct Monica Lovato, a Hispanic merchandiser, to work one of her days off. Ms. Lovato planned to celebrate her birthday that weekend, and she told Mr. Katt she wanted both days off, but Mr. Katt insisted and tried to accommodate her schedule as much as possible. That weekend Ms. Lovato never showed up to work as directed, even after Mr. Katt paged her repeatedly. When he was informed that Ms. Lovato had disobeyed an order to come into work, Mr. Grado never inquired about her reasons. Instead, Mr. Grado remarked, "You can't make somebody work one of their days off." *Id.* at 211. Ms. Lovato never received any discipline -- not even a warning -- as a result of the incident.

The district court granted summary judgment in favor of BCI. Operating within the *McDonnell Douglas* burden-shifting framework, it held that the EEOC had established a prima facie case of discrimination, but that BCI had articulated a legitimate nondiscriminatory reason for the termination: "his insubordinate conduct toward Grado." Mem. Op. & Order, 2004 U.S. Dist. LEXIS 28277 at *33. It held that no genuine issue of material fact exists as to whether this proffered explanation was pretextual because the pretext inquiry must focus exclusively on whether Ms. Edgar honestly believed that Mr. Peters was guilty of insubordination on Friday, September 28. Citing our statement in *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000), that pretext must be

evaluated by "look[ing] at the facts as they appear to the person making the decision to terminate plaintiff," the district court concluded that any factual disputes concerning the Friday conversation were immaterial because Ms. Edgar correctly applied BCI's policy concerning insubordination to the facts as she understood them. Mem. Op. & Order 24-25, 2004 U.S. Dist. LEXIS at *39-40. The district court found the termination letter ("You did not report to work on Sunday 9-30-01, therefore your employment [is] being terminated for insubordination") "consistent" with Ms. Edgar's declaration that the sole act of insubordination for which he was terminated was his conduct during the call on Friday. *Id.* at 26. According to the district court, the phone call and the failure to come to work formed part of the same "chain of events," and no reasonable jury could find that BCI's explanations were shifting or inconsistent.

In evaluating the EEOC's "rubber stamp" or "cat's paw" claim, the district court acknowledged that the EEOC had raised a genuine issue of fact as to whether Mr. Grado harbored racial bias against African Americans. It noted, however, that other circuits' "rubber stamp" cases "involved situations in which a decision-maker accepted the *recommendations* of a biased supervisor without conducting an independent investigation." *Id.* at 29 (emphasis in original). Here, Mr. Grado never officially recommended that Mr. Peters be terminated; he merely provided information to Ms. Edgar, who made the final decision. Also, according to the district court, Ms. Edgar *did* conduct an independent investigation: she asked Ms. Pederson to pull Mr. Peters' personnel file. The issue of Mr. Grado's bias therefore was not material.

The district court granted BCI's motion for summary judgment, and the EEOC now appeals. We review the

district court's decision *de novo*, viewing the evidence in the light most favorable to the EEOC and drawing all reasonable inferences in its favor. *Fuerschbach v. S.W. Airlines Co.*, 439 F.3d 1197, 1207 (10th Cir. 2006). We will affirm "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and BCI is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

II. Discussion

Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of racial discrimination, which "consists of a showing that (1) the plaintiff belongs to some protected class, (2) the plaintiff was qualified for the position or benefit at issue, (3) the plaintiff suffered an adverse employment action, and (4) the plaintiff was treated less favorably than others (e.g., the position at issue remained open after the adverse employment action)." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1134 (10th Cir. 2004). BCI concedes that the EEOC has established a prima facie case here: Mr. Peters is black, he was qualified for his job as a merchandiser, he was terminated, and the position remained open.

The burden therefore shifts to BCI to articulate a legitimate, nondiscriminatory reason for the employment action. *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005). The EEOC concedes that BCI has articulated a nondiscriminatory reason for its termination of Mr. Peters: his insubordination on Friday, September 28 during the phone conversation with Mr. Grado. Significantly, BCI maintains that Mr. Peters' absence on Sunday, September 30 had nothing to do with the decision, except insofar as it

confirmed that Mr. Peters' statements on Friday were insubordinate. App. 27 ("Mr. Peters was not terminated because he did not show up for work on Sunday....").

The sole issue on appeal is whether the EEOC has made a sufficient showing that BCI's proffered explanation is a pretext for race discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Here, it is undisputed that Ms. Edgar, who formally made the termination decision, worked in a different city and had no idea that Mr. Peters is black. She therefore could not have acted for racially discriminatory reasons. For the EEOC to prevail, it must make not only a factual showing that Mr. Grado harbored racial animus toward black employees, but also a convincing legal claim that his racial animus should be imputed to BCI despite the fact that Mr. Grado had no power to terminate anyone.

A. Subordinate Bias Liability

Other courts have recognized claims under Title VII based on the bias of a subordinate, often using the terms "cat's paw" or "rubber stamp" to describe the theory. The "cat's paw" doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *See* Fables of La Fontaine 344 (Walter Thornbury trans., Chartwell Books 1984). As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. *Id.* Today the term "cat's-paw" refers to "one used by another to accomplish his purposes." Webster's Third New International Dictionary Unabridged 354 (2002). In the employment discrimination context, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker

as a dupe in a deliberate scheme to trigger a discriminatory employment action. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998). The "rubber stamp" doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004) (en banc). Our sister circuits overwhelmingly have endorsed some version of these doctrines. *See Galdamez v. Potter*, 415 F.3d 1015, 1026 n.9 (9th Cir. 2005); *Hill*, 354 F.3d at 290; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Griffin v. Wash. Convention Ctr.*, 330 U.S. App. D.C. 81, 142 F.3d 1308, 1311-12 (D.C. Cir. 1998); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1213-14 (3d Cir. 1995); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (Posner, J.) (inaugurating the descriptor "cat's-paw" for this category of claim).

Although this Court has not yet had occasion to find for a plaintiff on a subordinate bias claim, we have strongly signaled our endorsement of the theory. We have stated that "under certain circumstances, a defendant may be held liable for a subordinate employee's prejudice even if the manager lacked discriminatory intent." *English v. Colo. Dep't of Corrs.*, 248 F.3d 1002, 1011 (10th Cir. 2001). Specifically, we have described a "rubber stamp" theory of liability, noting that "[t]o recover under this theory, the plaintiff must show 'that the decisionmaker followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee.'" *Id.* (quoting *Stimpson*, 186

F.3d at 1332) (alteration in original). Twice we have held that a plaintiff could not prevail because the decisionmaker had conducted an independent investigation of the facts, rather than relying entirely on the recommendation of the biased subordinate. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231-32 (10th Cir. 2000) (finding it "[i]mportant[]" that "in the course of his investigation" the decisionmaker asked the employee "to give his version of the exchange," but the employee declined to do so); *English*, 248 F.3d at 1011 (noting that the decisionmaker met twice with the employee and his attorney, and specifically asked for evidence rebutting or mitigating the findings of the allegedly biased subordinates). But we have described the plaintiffs' underlying theory of liability as "correct." *English*, 248 F.3d at 1011.

These subordinate bias theories comport with the basic agency principles incorporated by statute into Title VII. For purposes of Title VII, the term "employer" includes not only any "person engaged in an industry affecting commerce" but "any agent of such a person." 42 U.S.C. § 2000e(b). Although that language "surely evinces an intent to place some limits on the acts of employees for which employers are to be held responsible," *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), employers may be vicariously liable for the actions of their employees -- even intentional torts outside the scope of their employment -- if the employee "'was aided in accomplishing the tort by the existence of the agency relation,'" *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (quoting Restatement (Second) of Agency § 219(2)(d) (1958) [hereinafter Restatement]). In *Ellerth*, which involved a hostile work environment claim, the Supreme Court held that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of

the employer." *Id.* at 762. Citing with approval the seminal "cat's paw" opinion by Judge Posner, the Court seemed unconcerned with the possibility that the "tangible employment decision[]" might "be subject to review by higher level supervisors." *Id.* (citing *Shager*, 913 F.2d at 405). The "aided by the agency relation" standard applies even more clearly to subordinate bias claims, such as "cat's paw" or "rubber stamp" claims, because the allegedly biased subordinate accomplishes his discriminatory goals by misusing the authority granted to him by the employer -- for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions. *See* Restatement § 219(2) cmt. e (explaining that the "aided by the agency relation" standard applies in situations where "the servant may be able to cause harm because of his position"); *cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 802-05, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (contemplating vicarious liability based on abuse of authority by supervisors, but emphasizing that the "aid" in the "aided by the agency relation" formula must amount to more than access to a pool of potential victims and "the unspoken suggestion of retaliation").

Holding employers accountable for the actions of biased subordinates also advances the purposes of Title VII. It should go without saying that a company's organizational chart does not always accurately reflect its decisionmaking process. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (finding that the bias of a supervisor, the husband of the formal decisionmaker, could be imputed to the company because the supervisor "was the actual decisionmaker" and was "principally responsible for petitioner's firing"); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (noting that "courts will not blindly accept the titular

decisionmaker as the true decisionmaker"). A biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker. Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations. *Id.* n.13 (holding that employers may not insulate themselves from Title VII claims simply "by ensuring that the one who performed the employment action was isolated from the employee"). Indeed, such claims have the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against members of protected groups -- particularly if, as we have held, an employer can escape liability entirely by performing an independent investigation. *See English*, 248 F.3d at 1011. Construing the definition of an "employer" to permit subordinate bias claims therefore serves Title VII's "deterrent purpose." *See Ellerth*, 524 U.S. at 764 (noting that the extent of employer liability under Title VII should not depend exclusively on common-law agency principles, but also should encourage employer procedures that prevent discriminatory actions).

Despite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision. Some courts take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker." *See Russell*, 235 F.3d at 227. On this view, "summary judgment generally is improper where the plaintiff can show that an

employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action." *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) (citing *Shager*, 913 F.2d at 405). This standard apparently contemplates that any "influence," the reporting of any "factual information," or any form of "other input" by a biased subordinate renders the employer liable so long as the subordinate "may have affected" the employment action. Such a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation. *See Ellerth*, 524 U.S. at 745 (construing Title VII "to accommodate the agency principle of vicarious liability for harm *caused by* misuse of supervisory authority" (emphasis added)). When a biased subordinate merely plays a peripheral role, it cannot be said that he has "accomplish[ed]" a tortious act and "cause[d] harm" as required under agency law principles and, accordingly, under Title VII. Restatement § 219(2)(d) & cmt. e; *see also id.* cmt. a ("Rationale of liability") ("The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm."). Moreover, a lenient "may have affected" standard that punishes employers for any "input" -- no matter how minor -- weakens the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation.

At the opposite extreme, the Fourth Circuit has held that an employer cannot be held liable even if a biased subordinate exercises "substantial influence" or plays a "significant" role in the employment decision. *Hill*, 354 F.3d at 291. Taking its cue from the Supreme Court's statements in *Reeves* that "petitioner [had] introduced evidence that [the supervisor] was the actual decisionmaker" and was "principally

responsible" for his firing, *Reeves*, 530 U.S. at 151-52, the Fourth Circuit held that these formulations mark "the outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer." *Hill*, 354 F.3d at 289. On this view, the decisionmaker must be a "cat's paw" so completely beholden to the subordinate "that the subordinate is the actual decisionmaker." *Id.* at 290. The Fourth Circuit's strict approach makes too much of the phrase "actual decisionmaker" in *Reeves*; the Court was describing what the petitioner's evidence showed, not prescribing the "outer contours" of liability. *See Reeves*, 530 U.S. at 151-52 (using the phrases "actual decisionmaker" and "principally responsible" only in Part III.B, which begins, "Applying this standard here..."). The Fourth Circuit's peculiar focus on "who is a 'decisionmaker' for purposes of discrimination actions," *Hill*, 354 F.3d at 286, seems misplaced. The word "decisionmaker" appears nowhere in Title VII. Instead, the statute imposes liability for discrimination by employers and their agents, 42 U.S.C. § 2000e(b), which in accordance with agency law principles includes not only "decisionmakers" but other agents whose actions, aided by the agency relation, cause injury. *Ellerth*, 524 U.S. at 760. The Fourth Circuit's standard also undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.

We find ourselves in agreement with the Seventh Circuit, which has rejected the Fourth Circuit's approach as "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004). To prevail on a subordinate bias claim, a plaintiff must establish more than mere "influence" or "input" in the decisionmaking process. Rather, the issue is whether the

biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action. *Id.* This standard comports with the agency law principles that animate the statutory definition of an "employer." *See* Restatement § 219 (describing the scope of a master's liability "for the torts of his servants" and thereby incorporating standard tort concepts like causation). Both the Supreme Court and this Court require a comparable causal connection as part of analogous workplace discrimination claims. *See, e.g., Clark County School Dist. v. Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (requiring a "causal connection" between the plaintiff's protected activities and the adverse employment action in a Title VII retaliation claim); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994) (requiring a "causal nexus" between allegedly discriminatory workplace statements and the termination decision in an ADEA claim). We reaffirm our earlier decisions holding that, because a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. *English*, 248 F.3d at 1011. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. Indeed, under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory. *Kendrick*, 220 F.3d at 1231-32. Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class.

Finally, we address the district court's conclusion that an employer may be liable on a subordinate bias theory only if the decisionmaker receives and approves an explicit

recommendation to terminate an employee. Regrettably, subordinate bias cases have suffered from an abundance of vivid metaphors. The Fourth Circuit, for example, seems to have taken the "cat's paw" metaphor too literally in deriving its total-control-over-the-actual-decision standard. *Lust*, 383 F.3d at 584. Likewise, the district court in this case seems to have taken the "rubber stamp" metaphor too literally, requiring that an explicit recommendation must cross the desk of the decisionmaker, regardless of whether the subordinate's discriminatory actions in fact caused the termination. That limitation of subordinate bias claims not only runs counter to the fairly broad "aided by the agency relation" principle embodied in Title VII, but would leave employees unprotected so long as a subordinate stops short of mouthing the words "you should fire him," in person or on paper, to the decisionmaker. Stripped of their metaphors, subordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial bias can taint any of those functions. We see no reason to limit subordinate bias liability to situations that closely resemble the "cat's paw," "rubber stamp," "conduit," "vehicle," or other metaphors that imaginative lawyers and judges have developed to describe such claims.

With these principles in mind, we turn to BCI's decision to terminate Mr. Peters.

B. The Subordinate Bias Claim in this Case

The EEOC argues that BCI's proffered explanation for its termination decision is pretextual. To survive summary judgment on a subordinate bias theory, the plaintiff must first establish a genuine issue of material fact concerning the bias of the subordinate. It must then establish genuine issues of

material fact as to whether the proffered reason for the employment action is pretextual, which in a subordinate bias claim requires the plaintiff to demonstrate a causal relationship between the subordinate's actions and the employment decision.

1. Mr. Grado's Racial Bias

The district court held, and we agree, that the EEOC has raised a genuine issue of fact concerning Mr. Grado's racial animus. In general, "isolated racial comments" are insufficient to establish pretext unless they "can somehow be tied to the employment actions disputed in the case at hand." *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1289 (10th Cir. 2000) (internal quotation marks omitted). Nonetheless, at the summary judgment stage "all rational inferences from the evidence must be made in favor of the party opposing the summary judgment motion." *Ortiz v. Norton*, 254 F.3d 889, 896 (10th Cir. 2001). In *Ortiz*, we held that evidence of discrimination in employment decisions affecting other workers "could support an inference that the decision makers harbored a bias against Hispanics which might have affected other decisions, including the decisions adverse to plaintiff." *Id.* A plaintiff also "may show pretext 'by providing evidence that he was treated differently from other similarly situated, nonprotected employees who violated work rules of comparable seriousness,'" provided the "similarly situated" employee shares the same supervisor, is subject to the same performance standards, and otherwise faces comparable "relevant employment circumstances." *Green v. New Mexico*, 420 F.3d 1189, 1194 (10th Cir. 2005) (quoting *Kendrick*, 220 F.3d at 1232).

In this case, the EEOC has produced sufficient evidence to create a jury question concerning Mr. Grado's racial

animus. Mr. Wilson claims that Mr. Grado directed "many race-based remarks," and offered three examples of racial jokes and put-downs. App. 184-85. In his affidavit, Mr. Katt says that Mr. Grado may have used a racial epithet to describe Mr. Peters in the immediate aftermath of the termination and lawsuit.[2] *Id.* at 212. These comments may have been infrequent, but they certainly were not "isolated": they were directed at other black merchandisers under Mr. Grado's supervision, suggesting a pattern of racial bias in disciplinary matters that could have affected Mr. Grado's conduct with respect to Mr. Peters' termination, and in one case concerned Mr. Peters himself.

In addition, three other merchandisers -- two black and one Hispanic -- submitted affidavits giving specific examples of Mr. Grado's disparate treatment of black and Hispanic merchandisers. Mr. Young claims that Mr. Grado "nit-pick[ed] my work" and "constantly threatened to change my

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[2] BCI argues, in a footnote and without elaboration, that Mr. Katt's testimony on this point "is clearly inadmissible pursuant to Federal Rules of Evidence 602 and 403," and therefore should be ignored. Br. of Appellee 41 n.17. The first objection is obviously wrong. Rule 602 requires that a witness must have "personal knowledge of the matter" before testifying, but Mr. Katt's affidavit recounts a conversation he personally conducted with Mr. Grado. The second objection is difficult to discern. Rule 403 provides that evidence "may be excluded" if, in the view of the district court, "its probative value is substantially outweighed by the danger of unfair prejudice." If credited, Mr. Katt's testimony about a racial slur directed at Mr. Peters shortly after his termination is at least probative of Mr. Grado's ~~motive at the~~ time of the termination. Like the district court, which considered the testimony, *see* Mem. Op. & Order, 2004 U.S. Dist. LEXIS at *22, we are not inclined to ignore the testimony as unduly prejudicial at this stage.

days off and to change my route," but "did not... treat non-African American employees in this manner." App. 181. He recalls being threatened with a schedule change for leaving the back room of one of his stores "a bit messy," while Mr. Grado tolerated a non-black merchandiser's "very messy" back room "many times." *Id.* Mr. Esquibel named six Hispanic employees who were not fired after disobeying company directives. *Id.* at 183. Mr. Wilson says that Mr. Grado was "unusually picky" with black merchandisers, "often calling us back to stores that had been serviced to redo some minor detail, while the Hispanic Merchandisers were not subject to this same level of scrutiny." *Id.* at 185. Broadly, he claims that Mr. Grado "treated Hispanic Merchandisers with respect" but "continually demeaned me and threatened to replace me." *Id.*

Most importantly, the EEOC produced evidence of Mr. Grado's unfazed response to the incident involving a Hispanic merchandiser, Ms. Lovato. Like Mr. Peters, Ms. Lovato reported to Mr. Grado and was directed to work one of her days off. Like Mr. Peters, she failed to come to work, in direct violation of her instructions and in spite of considerable efforts by Mr. Katt to come to accommodate her schedule. Unlike Mr. Peters, who was fired two days later, Ms. Lovato received no discipline whatsoever as a result of the incident, with Mr. Grado reportedly saying, "You can't make somebody work one of their days off." *Id.* at 211. To be sure, there are factual differences between these incidents: Ms. Lovato received all of her orders through Mr. Katt whereas Mr. Peters spoke to Mr. Grado directly, and Ms. Lovato initially acquiesced in the orders (before disobeying them) whereas, according to Mr. Grado, Mr. Peters initially behaved in a defiant manner and announced an intention to disobey the orders (before being excused from work). They are similar enough, however, that in light of the dramatic

difference between Mr. Grado's actions in each case, as well as the other evidence of discriminatory conduct, a reasonable jury could find the situations comparable and infer that racial animus played a role in Mr. Peters' treatment.

We do not necessarily believe that each of the incidents recounted above would support a charge of discrimination in isolation, but taken as a whole, this evidence of racial comments and disparate treatment of black merchandisers creates a genuine issue of fact regarding Mr. Grado's racial bias.

2. Pretext and Causation

To show that an employer's proffered nondiscriminatory reason for an employment action is pretextual, a plaintiff must produce evidence of "'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting *Olson v. GE Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996)). Because the EEOC's pretext argument depends in part on a subordinate bias theory, it must establish a genuine issue of material fact as to whether Mr. Grado's bias translated into discriminatory actions that caused Mr. Peters' termination.

BCI now maintains that it fired Mr. Peters solely because of his defiant conduct on the phone with Mr. Grado on Friday, and that "Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed... as the fulfillment of [his] stated intention to defy a direct order from Mr. Grado." App. 27. On this

theory, missing work on Sunday merely confirmed that Mr. Peters' statements on Friday were insubordinate, and did not serve as a basis for dismissal. Yet the first explanation provided by Mr. Grado at the Tuesday morning meeting was, "You've been terminated for insubordination, *for not showing up for work*." *Id.* at 193 (emphasis added). The Disciplinary Status Notice unequivocally states that the failure to show up for work on Sunday *was* the act of insubordination: "You did not report to work on Sunday 9-30-01, therefore your employment in [sic] being terminated for insubordination." *Id.* at 41. That document lists Sunday, not Friday, as the date of the violation that prompted the termination, indicating that the act of insubordination was the failure to come into work, not Mr. Peters' attitude during the earlier phone call. Indeed, on October 16, 2001, just two weeks after the termination, Ms. Pederson filed paperwork with the New Mexico Department of Labor stating that "Stephen was told by Cesar Grado that *if he didn't show up*, it would be considered insubordination." *Id.* at 165 (emphasis added). When asked to describe the "final incident that caused the discharge," Ms. Pederson wrote, "Stephen did not show up for work on 9/30." *Id.* Only later did BCI characterize its decision to fire Mr. Peters as hinging on his defiant conduct over the phone, rather than on his absence.

A jury might reasonably conclude that BCI's original explanation, that Mr. Peters was fired because he failed to show up for work on Sunday, was pretextual because Mr. Peters was excused from work that day. Mr. Peters was in fact sick, had visited an urgent care clinic, and had been diagnosed with a sinus infection and directed not to work until Monday. He phoned Mr. Katt to report the illness, and was excused from work--an interaction that BCI concedes is perfectly ordinary between merchandisers and account managers. A jury could credit Ms. Edgar's statements that

she knew that Mr. Peters' absence was excused and nonetheless (incorrectly, as it turns out) deemed Mr. Peters' "alleged sickness" suspicious under the circumstances. But it might just as easily credit Mr. Katt's testimony, rather than Ms. Edgar's, and conclude that neither Mr. Grado nor Ms. Edgar learned that Mr. Peters called in sick until the scheduling discussion between Mr. Katt and Mr. Grado on Monday evening, after Ms. Edgar claims she had already made the decision to fire Mr. Peters. The affidavits of Mr. Katt and Mr. Peters state that key players in the decision fell silent upon hearing that Mr. Peters' absence was excused, suggesting that they were indeed surprised by the news.

Recognizing the weakness of the original explanation, BCI has refined its position by relying entirely on Mr. Peters' purported insubordination in his conversation with Mr. Grado on Friday. A jury could conclude, however, that this reason too is a pretext for race discrimination, as the result of Mr. Grado's racial animus. It is undisputed that Ms. Edgar, and Ms. Edgar alone, made the formal termination decision. Mr. Grado has succinctly described his role in the disciplinary process: "I gather the facts and I present them to our HR department, and they decide whether it is an insubordination or not and whether there's action to be taken or not." App. 63. Surely Ms. Edgar harbored no ill will toward Mr. Peters on account of his race, because she worked in Phoenix and did not even know that he was black. Yet it is also undisputed that Ms. Edgar relied exclusively on Mr. Grado's account of the Friday phone conversation in making her decision. She conducted no independent inquiry into the events that took place that Friday, and failed to take even the basic step -- cited by this Court in *Kendrick*, 220 F.3d at 1231-32 -- of asking Mr. Peters for his side of the story. Accordingly, Mr. Grado's report that Mr. Peters had behaved in a defiant, insubordinate manner on Friday caused the

termination. If the jury concludes that Mr. Grado's report was tainted by race discrimination -- as it might, for the reasons explained above -- it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual.

BCI argues that any factual disputes concerning the Friday conversation between Mr. Grado and Mr. Peters are immaterial because both parties agree that Mr. Peters ended the conversation by saying, "[D]o what [you] got to do and I'll do what I got to do." App. 58. We agree that this statement can only be interpreted as defiance, and if Mr. Grado had reported nothing but this closing remark to Ms. Edgar, there would be no reason to believe that racial bias on the part of Mr. Grado caused the termination. Yet Mr. Grado reported several additional facts about his conversations on Friday afternoon. First, he told Ms. Edgar that he had learned, through Mr. Katt, that Mr. Peters was already planning to call in sick two days later, in violation of company policy. Second, he reported that in their phone call Friday afternoon, he asked Mr. Peters to describe his plans, affording an opportunity for Mr. Peters to explain his scheduling conflict. Third, he reported that Mr. Peters angrily replied that it was "none of [your] business," and was "yelling" during the discussion. *Id.* at 36, 65.

All of those facts are disputed. Instead of crediting Mr. Grado's testimony, a jury might believe Mr. Katt, who says that he never told Mr. Grado that Mr. Peters had advance plans to call in sick on Sunday, or Mr. Peters, who says that he simply told Mr. Grado that he had been feeling sick that week, not that he planned to violate company policy. A jury might also credit Mr. Peters' version of the Friday afternoon conversation, in which Mr. Grado never bothered to ask Mr. Peters' reasons, Mr. Peters never refused to answer Mr.

Grado's questions, and Mr. Peters remained calm throughout the discussion. There is good reason to believe that Ms. Edgar acted on those additional facts, not just on Mr. Peters' "do what you have to do" remark. She denounced Mr. Peters' advance plans to call in sick as "not acceptable," an abuse of the company sick leave policy. *Id.* at 23. Also, it was Ms. Edgar who originally insisted that Mr. Grado "find out what the situation was" and determine whether Mr. Peters had a "compelling reason" he could not come to work, which suggests that she found that information important in making her decision. *Id.* at 23. Taking the evidence in the light most favorable to the EEOC, it is easy to imagine that the additional details of Mr. Grado's account, in which Mr. Peters appeared to be fabricating his illness, started yelling at his supervisor, and refused to answer questions, led Ms. Edgar to characterize the conversation as "insubordination" warranting dismissal. The question is not whether Ms. Edgar *could have* terminated Mr. Peters because of his closing remark alone, which appears to have been permissible under BCI policy, but what *actually did* cause the adverse employment action. If a jury credits the testimony of Mr. Peters and Mr. Katt, and thus concludes that Mr. Grado lied to Ms. Edgar, it could also find that the additional claims about Mr. Peters' conduct caused the termination.

Finally, BCI argues, and the district court agreed, that Ms. Edgar did not rely solely on Mr. Grado but conducted an independent investigation. This investigation consisted of exactly one action: directing Ms. Pederson to pull Mr. Peters' personnel file. We find this "investigation" inadequate, as a matter of law, to defeat the inference that Mr. Grado's racial bias tainted the decision. Obviously the file contained no information about the recent incident involving Mr. Grado, so it is difficult to see how reading it could "independently" confirm what had happened. True, the

file contained a description of a 1999 incident of insubordination, which (despite its ignoble back story) seemed consistent with Mr. Grado's version of events. The problem is that Ms. Edgar never sought any other version of events, and therefore had no reason other than Mr. Grado's report to believe that the file was relevant. Simply pulling the file therefore does not constitute an independent investigation, and a jury could conclude that Mr. Grado's factually disputed report -- the sole source of information on which Ms. Edgar relied -- caused the termination.

Because the EEOC has established genuine issues of material fact as to whether the nondiscriminatory reasons offered by BCI are pretextual, summary judgment was inappropriate.

III. Conclusion

We **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 02-1644JB/RHS

[Filed June 10, 2004]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff*,	)
v.	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, doing business as Phoenix Coca-Cola Bottling Company; COCA-COLA BOTTLING COMPANY OF ALBUQUERQUE, *Defendants*.	)

MEMORANDUM OPINION AND ORDER

BEFORE: James O. Browning, UNITED STATES DISTRICT JUDGE.

THIS MATTER comes before the Court on the Defendant's Motion for Summary Judgment, filed February

19, 2004 (Doc. 65). The primary issue is whether the Plaintiff Equal Employment Opportunity Commission ("EEOC") has demonstrated that there is a genuine issue of material fact whether Defendant BCI Coca-Cola Bottling Company of Los Angeles ("BCI") terminated Stephen Peters from his employment because he is African American. Because the Court finds that the EEOC has not established a genuine issue of material fact, it will grant BCI's Motion for Summary Judgment and dismiss the EEOC's claims.

FACTUAL BACKGROUND

BCI is a wholly owned subsidiary of Coca-Cola Enterprises, Inc., the world's largest bottler of Coca-Cola® products. *See* Declaration of Patricia K. Edgar ¶ 2, at 1-2 (executed February 2, 2004). BCI does business in Albuquerque as the Coca-Cola Bottling Company of Albuquerque. *See id.* Peters worked as a merchandiser in the Albuquerque facility under the supervision of Cesar Grado, a District Sales Manager. *See* Declaration of Cesar Grado ¶¶ 1, 5, at 1-2 (executed February 3, 2004).

Merchandisers are hourly employees whose job duties include product placement and cleaning, arranging, and rotation of displays and promotional materials in retail grocery or other outlets. *See id.* ¶ 2, at 1. Peters was one of six merchandisers working under Grado's supervision. *See id.* Grado also supervised two account sales representatives or "account managers." *See id.*

Account managers are salaried sales employees responsible for selling Coca-Cola products to accounts. *See id.* At all relevant times, Jeff Katt was an account manager under Grado's supervision. *See id.* ¶ 7, at 3. According to Peters, Katt supervised his day-to-day work activities. *See*

Affidavit of Stephen Peters ¶ 9, at 2 (executed March 17, 2004).

Grado was responsible for scheduling merchandisers to cover all accounts in his territory. *See* Grado Decl. ¶ 2, at 1. Merchandisers work five days each week with two days off. *See id.* ¶ 3, at 2. Because BCI services its accounts seven days a week, none of the merchandisers had the same two days off. *See id.*

Grado occasionally required merchandisers to work on their scheduled days off to provide extra coverage for routes during particularly busy times and/or when other employees are absent. *See id.* ¶ 4, at 2. An example of a busy time requiring additional coverage would be when one or more accounts is running an "ad" that is offering special prices on Coca-Cola products which results in increased volume of sales and thus requires more frequent deliveries. *Id.* When Grado needed extra help covering routes, he first requested volunteers and then asked merchandisers to come in on their days off on a rotating basis. *See id.* Peters disputes that Grado used this method to find coverage for routes. *See* Peters Aff. ¶ 15, at 2-3 ("Mr. Grado just picked people to work.").

Because Peters was the most senior merchandiser under Grado's supervision, he had Saturday and Sunday as his scheduled days off. *See* Grado Decl. ¶ 5, at 2. During the first nine months of 2001, Peters worked on his days off on 8 occasions, including three Sundays and five Saturdays. *See id.* During the same 34-week period, merchandiser Frank Ortiz (Hispanic) worked on his scheduled days off 12 times, merchandiser Donald Connor (white) worked on his scheduled days off 10 times, merchandiser Arturo Lopez (Hispanic) worked on his scheduled days off 9 times, and a

later hire, merchandiser Robert Espinosa (Hispanic), worked on his scheduled days off 7 times in 21 weeks. *See id.*

According to Peters, he never received a written reprimand for job performance problems or attendance problems during his employment with BCI. *See* Peters Aff. ¶ 1, at 1. Peters states that he was considered a "good merchandiser" and was awarded a certificate for his five years of "service, dedication and commitment" to the company. *Id.* ¶¶ 2-3, at 1. Peters' personnel file indicates, however, that Peters' supervisor gave him a final warning for an act of insubordination which involved refusing to work on a scheduled day off. *See* Disciplinary Status Notice (September 17, 1999).

Grado was responsible for monitoring the employees working under his supervision, and when an employee had an attendance, performance, and/or disciplinary issue, he was responsible for bringing the issue to the attention of the BCI Human Resources Department. *See* Grado Decl. ¶ 6, at 3. The Human Resources representative would then make a decision about which workplace policy, if any, applied to the situation and the appropriate action to take based upon what had occurred. *See id.*; Deposition of Cesar Grado at 31:24 to 32:3 (taken December 3, 2003); Deposition of Sherry Pedersen at 30:19 to 31:4 (taken December 4, 2003).

The top-ranking BCI Human Resources representative at the Albuquerque facility during the relevant period was Senior Human Resources Administrator Sherry Pedersen. *See* Declaration of Sherry Pedersen ¶ 1, at 1 (executed February 3, 2004). With the exception of terminations, Pedersen authorized all disciplinary actions with respect to employees at the Albuquerque facility. *See id.* ¶ 2, at 1-2. Patricia Edgar, who was the Employee Relations Manager for BCI at

all relevant times, had to authorize all terminations. *See id.*; Edgar Decl. ¶ 3, at 2. Edgar's office was based in Phoenix, Arizona and her responsibilities included overseeing human resource functions at BCI facilities in multiple states. *See* Edgar Decl. ¶ 1, at 1. At all relevant times, Pedersen reported directly to Edgar. *See id.*; Pedersen Decl. ¶ 1, at 1.

BCI contends that Grado did not have authority to discipline or terminate employees working under his supervision. *See* Grado Decl. ¶ 6, at 3. Peters contends that Grado gave employees the impression that he had the authority to fire employees. *See* Deposition of Jeff Katt at 71:21 to 72:13 (taken March 8, 2004); Affidavit of Michael Wilson ¶ 8, at 2-3 (executed March 12, 2004). When BCI terminated Peters' employment, Katt assumed that Grado was the one who had made the decision. *See* Katt Depo. at 70:24 to 71:4.

In addressing employee disciplinary issues, BCI Human Resources personnel consult written policies setting forth workplace rules and regulations, which are divided into three categories according to the severity of the infraction. *See* Pedersen Decl. ¶ 3, at 2. Group A violations address the most serious workplace issues, such as insubordination, and are sufficient to result in immediate discharge, although discharge is not a mandatory result. *See id.* Group B and C violations, on the other hand, are generally dealt with according to a progressive discipline policy, depending on the nature of the infraction. *See id.* Group C includes the lowest level violations, including attendance issues. *See id.* "No call/no show" violations, which occur when an employee fails to report for a scheduled shift without notifying his or her immediate supervisor in accordance with BCI policy, are handled under a separate written policy and are not a basis for immediate termination. *Id.* BCI contends that Human

Resources personnel retain discretion in applying these rules and policies, as BCI must assess each situation on an individualized basis. *See id.*

BCI Human Resources personnel uses a very specific and narrow definition of the term insubordination.

> Insubordination does not mean a situation where an employee has failed to carry out normal job responsibilities or failed to meet performance expectations. Nor is insubordination simply failing or even refusing to follow a supervisor's instructions. Rather, insubordination occurs when the employee knows that he is considered to be defying a direct order of the supervisor and that his conduct could lead to termination.

Edgar Decl. ¶ 9, at 4. Peters disputes this definition, because he contends that BCI's policy does not define insubordination. Peters also contends that there is inconsistent testimony about what constitutes insubordination. Donald Bateluna, Grado's supervisor, testified that insubordination occurs when an employee fails to follow a direct order after being warned that failure to obey can be considered insubordination. *See* Deposition of Donald R. Bateluna at 47: 8-19 (taken January 29, 2004). Bateluna also testified that insubordination occurs when the employee follows through with his or her refusal to perform the act a supervisor has ordered him or her to do, not when the employee refuses to obey. *See id.* at 48:25 to 49:9.

During the weekend of Saturday, September 29, 2001, and Sunday, September 30, 2001, three of the chain stores in Grado's area were running ads. *See* Grado Decl. ¶ 7, at 3. Accordingly, Grado needed extra merchandisers to service the accounts. One of the merchandisers, Joseph Rivera, had

previously told Grado that he had a commitment which prevented him from coming in on Sunday, September 30, 2001. *See id.* Grado asked Katt, to relay a message to Peters that Grado needed him to work on one of his days off that weekend. *See id.*; Katt Depo. at 40:10-14. Katt told Grado that he did not believe Peters would be willing to work on Sunday. *See* Grado Decl. ¶ 7, at 4; Katt Depo. at 40:20-21 ("He's not going to work six days this week."). It is Grado's recollection that Katt told him he believed Peters was going to call in sick that weekend. *See* Grado Decl. ¶ 7, at 4.

Peters asserts that he never told Katt that he planned to call in sick. *See* Peters Aff. ¶ 25, at 4. Peters had worked all his scheduled days that week and had not been out sick. *See* Grado Decl. ¶ 7, at 4. Peters had not, however, been feeling well all week; Peters' plans were to go out of town for the weekend, but because he had not been feeling well, he was going to go to the doctor and postpone his travel plans. *See* Deposition of Stephen Brian Peters at 122:12-25 (taken December 2, 2003).

On Friday, September 28, 2001, Grado learned that one of the "floater" merchandisers, Damian Mirabal, had suffered an on-the-job injury and could not return to work for a week. *See* Grado Decl. ¶ 7, at 3. Mirabal typically covered Peters' routes on Peters' scheduled days off. *See id.* ¶ 7, at 4. The remaining merchandisers were already scheduled to work that weekend, except Rivera, who was unavailable, and so Grado was now a person short and had no one left to bring in except Peters. *See id.* Grado claims that he checked with other District Sales Managers to see if they had anyone available to help him, but they did not. *See id.*

Based on his conversation with Katt, Grado understood around mid-day on Friday, September 28, that he was going

to have to require Peters to come in to work that weekend, so he decided to seek advice from the BCI Human Resources Department. *See id.* ¶ 8, at 4. Ordinarily, Grado would have spoken with Pedersen regarding the situation, but she was out of the office, and so he called Edgar in Phoenix. *See id.* Grado explained to Edgar that he needed Peters to work on his day off that weekend because of a high volume work situation and a manpower shortage, and asked whether he could order Peters to come in to work. *See id.*; Edgar Decl. ¶ 4, at 2. Edgar asked Grado if he had looked into every other way of getting the routes covered, and he said he had. *See* Grado ¶ 8, at 4.

Edgar told Grado he could require Peters to come in to work. *See* Grado Decl. ¶ 8, at 4; Edgar Decl. ¶ 5, at 3. Edgar asked Grado if there were some compelling reason Peters could not come in to work, and Grado told her that he had not spoken with Peters yet, but had heard he was going to call in sick. *See* Edgar Decl. ¶ 5, at 3. Edgar told Grado that it was not acceptable for Peters to plan to call in sick two days before his shift. *See id.*[1]

BCI policy requires employees to call in sick to their immediate supervisor at least one-half hour before their regular starting time on each day of absence. *See id.* BCI policy also states that employees do not need to call in on each day of an absence if other arrangements have been

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[1] Peters objects that Grado's statement -- "but had heard he was going to call in sick" -- is inadmissible hearsay. The Court disagrees. BCI is not offering it for the truth of the statement, but as evidence of what Grado said to Edgar. *See* Fed. R. Evid. 801(c)("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

made. Edgar instructed Grado to call Peters and find out what the situation was. *See* Edgar Decl. ¶ 6, at 3.

Edgar told Grado that, if he encountered resistance from Peters, unless Peters presented some compelling reason why he could not work on the day in question, he needed to explain to Peters that he was being given a direct order to come to work and that failure to comply with the order could be insubordination and could lead to termination. *See* Grado Decl. ¶ 8, at 4; Edgar Decl. ¶ 6, at 3. After Grado got off the telephone with Edgar, he paged Peters, and Peters called him back. *See* Grado Decl. ¶ 9, at 4.

BCI contends that Grado told Peters he needed him to work that weekend, and Peters said he could not work because he had plans. *See id.* ¶ 9, at 4-5; Peters Depo. at 121:1-5. BCI maintains that Grado asked Peters what his plans were, but Peters told Grado that his plans were none of Grado's business. *See* Grado Decl. ¶ 9, at 5. Peters denies that Grado asked him what his plans were. *See* Peters Aff. ¶ 28, at 4. Peters also claims that he told Grado he had not been feeling well all week. *See* Peters Depo. at 121:5-6.

Grado then told Peters: "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." *Id.* at 121:11-14; Grado Decl. ¶ 9, at 5; Grado Depo. at 259:17-21. Peters responded to Grado's statement by telling Grado: "Do what [you've] got to do, and I'll do what [I've] got to do." Peters Depo. at 121:25 to 122:1; Grado Decl. ¶ 9, at 5. While Peters does not deny that he and Grado made these statements during their telephone conversation, he insists that he was not refusing to work on Sunday, September 30. *See* Peters Aff. ¶ 29, at 4. Peters maintains that his statement to Grado was for the purpose of

ending the conversation with Grado so that it would not become a confrontation. *See id.* ¶ 6, at 2. Peters also asserts that Grado never told him that his conduct during the telephone call was insubordination. *See id.* ¶ 29, at 4.

After he spoke with Peters on Friday afternoon, Grado called Edgar back and told her what had happened. Grado Decl. ¶ 10, at 5; Edgar Decl. ¶ 7, at 3-4. Peters does not dispute that Grado told Edgar these details. At that point, Edgar believed that there was sufficient evidence to find that Peters had committed the offense of insubordination, a Group A offense subject to immediate discharge. *See* Deposition of Patricia K. Edgar at 38:12-17 (taken December 4, 2003). Edgar states that Peters' conduct on Friday, September 28, 2001, standing alone, would have warranted termination under BCI policy. *See* Edgar Decl. ¶¶ 8, 10 at 4.

At that point, Edgar understood that Peters had left for the day, because merchandisers' regular shifts usually end at 2 p.m. *See id.*; Edgar Depo. at 41:20-25. Peters disputes that he left work at 2:00 p.m., because on Friday, September 28, 2001, Peters worked over 11 hours, starting at 5:00 a.m. *See* Peters Aff. ¶ 30, at 4. In any case, Edgar told Grado they would deal with the situation on Monday. *See* Edgar Decl. ¶ 10, at 4-5; Grado Decl. ¶ 10, at 5.

Because, based on his conversation with Peters, Grado believed that Peters would not be coming to work on Sunday, Grado spoke with Katt again on Friday afternoon to make arrangements to cover all the routes on Sunday. *See* Grado Decl. ¶ 11, at 5; Katt Depo. at 28:3:16. Because no merchandisers were available, Grado and Katt planned to cover the routes themselves. *See* Grado Decl. ¶ 11, at 5.

Either Friday afternoon or Monday morning, Edgar spoke with Pedersen about the situation involving Peters. *See* Edgar Decl. ¶ 11, at 5. According to standard practice, Pedersen had reviewed Peters' personnel file after learning of the situation. *See id.*; Pedersen Decl. ¶ 5, at 2-3. At the hearing on this motion, BCI informed the Court that this file was located in the Albuquerque office. *See* Transcript of Motion Hearing at 19:6-19 (April 7, 2004)("Transcript").[2] The EEOC did not dispute that assertion. Pedersen informed Edgar that Peters' personnel file contained a Disciplinary Status Notice related to a previous incident of insubordination in September 1999.[3] BCI stated at the hearing that Pedersen faxed the two page Disciplinary Status Notice to Edgar. *See* Transcript at 19:17-25. The EEOC did not dispute that assertion.

The 1999 incident involved a supervisor, other than Grado, who wrote Peters up for insubordination because he refused to work on a scheduled day off. *See* Disciplinary Status Notice (1999). BCI suspended Peters and issued him a final written warning that further instances of insubordination could lead to termination. *See id.*; Pedersen Decl. ¶ 5, at 2-3. Grado did not supervise Peters in 1999. Peters disputes that he received such a final warning in 1999. Peters Aff. ¶ 5, at 2. BCI contends that Peters' prior similar incident with a different supervisor contributed to Edgar's

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[2] The Court's citations to the transcript of the hearing refer to the Court Reporter's original, unedited version. Any finalized transcript may contain slightly different page and/or line numbers.

[3] Peters objects to the admissibility of the Disciplinary Status Notice, contending that it is inadmissible hearsay. Again, BCI is not offering the Notice as evidence of the truth about the incident in 1999, but for its influence on Edgar's state of mind.

conclusion that Grado had presented an accurate account of events with respect to Peters' conduct. *See* Edgar Decl. ¶ 11, at 5; Edgar Depo. at 41:6-9.

On Saturday, September 29, 2001, Peters went to a Presbyterian Medical Center clinic because he was still not feeling well. *See* Peters Depo. at 146:4-25. Peters reported to the clinic staff that he was not feeling well, including headache, sinus pain, and fatigue. *See id.* at 148:6-9. The doctor diagnosed a sinus infection and, after Peters told her he had to go to work on Sunday, she told him he was exhausted and overworked. The doctor offered to write Peters an excuse from work, but Peters told her he did not need one unless he missed 2-3 days. The doctor did, however, give Peters a prescription for medication. *See id.* at 149:10-11; *id.* at 151:8-11.

Peters called Katt on Saturday evening to tell him he was sick, he had been to the doctor, and to request permission to stay home on Sunday. Katt gave Peters permission and told Peters to call him if for any reason he felt better in the morning. *See id.* at 194:15 to 195:18. Katt attempted to contact Grado once or twice, but did not get a response back from Grado. *See* Katt Depo. at 25:14-23. Katt testified that, because it was a weekend, it was not unusual for Grado not to call him back. *See id.* Because Peters was not feeling well, he stayed home on Saturday, September 29, 2001 and Sunday, September 30, 2001. *See* Peters Aff. ¶ 7, at 2; Grado Decl. ¶ 12, at 5. After the conversation with Grado on Friday afternoon, Peters had no further communication with Grado until Monday, October 1, 2001. Peters reported for work as scheduled on Monday morning, October 1, 2001. *See* Grado Decl. ¶ 12, at 5.

On Monday, October 1, 2001, Edgar had at least two telephone meetings with Grado and Pedersen to discuss the situation involving Peters. *See* Edgar Decl. ¶ 12, at 5. During these conversations, Grado gave no opinion or recommendation as to what he thought should happen to Peters. *See* Grado Decl. ¶ 13, at 5; Edgar Decl. ¶ 15, at 7.[4] Grado reported that Peters had not come to work on Sunday, September 30, 2001, and had not attempted to contact him. *See* Edgar Decl. ¶ 12, at 5. Edgar asked Grado to check to make sure Peters had not made any attempt to contact him over the weekend. *See id.*; Grado Decl. ¶ 13, at 5. Grado checked and confirmed that Peters had made no attempt to contact him directly, but learned that Peters had called in sick to Katt on Saturday night. *See* Grado Decl. ¶ 13, at 6; Edgar Decl. ¶ 12, at 5-6.

By the end of the day on Monday, October 1, 2001, Edgar made the decision to terminate Peters' employment for insubordination. *See* Edgar Decl. ¶ 13, at 6. Peters disputes that Edgar made the decision. Peters asserts that Grado made the decision to terminate Peters' employment and that Edgar authorized Grado's decision.

Edgar states that her decision was based on several factors, but first and foremost was Peters' conduct towards Grado on Friday, September 28, 2001. *See id.* There was no question in Edgar's mind that Peters had committed the offense of insubordination that day. *See id.* The prior

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[4] Peters disputes this fact because Edgar stated at her deposition that Grado does have authority to recommend discipline. *See* Edgar Depo. at 195:24 to 196:7. The EEOC, however, has not presented evidence that Grado gave an opinion or recommendation during his conversations with Edgar.

incident of insubordination, and the final warning BCI issued to Peters in 1999, also factored into Edgar's decision to terminate his employment. *See id.* Edgar understood that Peters had already been given more chances than the policy required on this issue, and that any action short of termination could set a bad precedent for BCI's stance on insubordination. *See id.* Peters' failure to come to work on Sunday also contributed, to a lesser extent, to Edgar's decision to terminate Peters' employment, insofar it represented the continuation of the act of insubordination which Peters commenced on Friday, September 28, 2001. *See id.* ¶ 14, at 6.

Peters worked all day Monday from 5:00 a.m. to 5:00 p.m. and then saw Grado at a health insurance meeting on Monday evening. On Monday evening, Grado told Peters to be at the plant at 8:00 a.m. the next day, to which Peters responded "okay." Peters Depo. at 134:2 to 136:20.

At the meeting on Tuesday October 2, 2001, Grado asked Peters if he knew why he was there (in Pedersen's office), and Peters responded that he did not know. *See id.* at 138:7-10. Pedersen and Bateluna, Grado's supervisor, were also in present at the meeting. *See id.* at 137:18-24. Grado told Peters that he had been terminated for insubordination. *See id.* at 138:11-14. Peters informed Grado that he had "reported off work" to his immediate supervisor, Jeff Katt, because he had been sick, and that Katt had approved his absence. *Id.* at 138:24 to 139:4. Peters was discharged immediately and did not receive an exit interview. Peters contends that his immediate dismissal without an exit interview and investigation was against company policy. Edgar testified that Peters should have received an exit interview and that she does not know why he did not receive one. *See* Edgar Depo. at 185:18-22.

Edgar stated that she did not learn that Peters was African American until Pedersen called her after the termination meeting on Tuesday, October 2, 2001. *See* Edgar Decl. ¶ 17 at 7-8. Pedersen stated that she did not know that Peters was African American until he walked into her office for the termination meeting on Tuesday, October 2, 2001. *See* Pedersen Decl. ¶ 10 at 3. The EEOC contends that both Edgar and Pedersen did have knowledge that Peters is African American based on their access, to information disclosing Peters' race. *See* Plaintiff Equal Employment Opportunity Commission's Response in Opposition to Defendant's Motion for Summary Judgment at 14, filed March 17, 2004 (Doc. 73). Peters' personnel file contained documents that revealed that he was African American. Included in his file were two "Confidential Employee Supplemental Data Sheets" where Peters had marked his race as "black." The EEOC also contends that Edgar had direct access to information concerning employee ethnicity.

Peters contends that BCI treated him differently than other employees in similar situations. *See* Peters Aff. ¶ 16 at 3. According to Peters, other employees missed more days in one year than Peters missed in six and a half years. *See* Peters Depo. at 162:21 to 163:9. Peters missed two days in six and a half years: one with a doctor's excuse and one time when his fiance's son was killed and he missed work to attend the funeral (the 1999 incident). *See id.*

The EEOC has proffered evidence that Grado treated African Americans less favorably than he treated employees of other racial groups or otherwise harbored racial bias toward African Americans. Three BCI employees submitted affidavits containing statements that Grado treated African American employees worse than he treated non-African Americans and made racial remarks at work. *See* Affidavit

of James Young ¶ 6, at 2 (executed March 12, 2004); Wilson Aff. ¶¶ 5, 7, at 1-2; Affidavit of Bryan Esquibel ¶¶ 5-7, at 1-2 (executed March 12, 2004). Katt also testified that Grado may have called Peters a "nigger." Katt Depo. 62:19 to 65:2. Katt also went to great lengths, however, to clarify that he was not sure that Grado actually made that statement. *See id.*

The EEOC directed the Court's attention to four BCI employees that it contends were treated more favorably than Peters. Damian Mirabal is a non-African American merchandiser who worked under Grado's supervision from December 2000 to November 2001. Mirabal received a verbal warning for having missed work five times in a six month period. Arturo Lopez, a Hispanic merchandiser, refused to return a page from his supervisor and was threatened with insubordination and termination. BCI did not terminate Lopez because he did not return to work and therefore "abandoned his job." Supplemental Declaration of Sherry Pedersen ¶ 2, at 1-2 (executed March 30, 2004). Oran Sage was a non-African American employee who was not under Grado's direct supervision.[5] BCI disciplined Sage for leaving the premises without his supervisor's approval. *See* Deposition of Oran Sage at 36:3-18. Monica Lovato, a Hispanic merchandiser under Grado's supervision, failed to report for work on a scheduled day off. Lovato voluntarily terminated her employment in 2002. *See* Pedersen Decl. ¶ 14 at 5.

BCI contends that Peters never made any formal complaints to anyone at BCI at any time during his employment that he was subjected to discrimination based on

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[5] At times, the parties also refer to Mr. Sage as "Kelly" Sage.

his race. *See* Peters Depo. at 87:5-16. In his affidavit, Peters states that he complained to James Young, a BCI employee, on several occasions that he felt he was being treated differently because he was African American. *See* Peters Aff. ¶ 16, at 3. Peters brought no formal complaints of race discrimination to the attention of the Human Resources Department during his employment at BCI. *See* Pedersen Decl. ¶ 8 at 3.

SUMMARY JUDGMENT STANDARD IN EMPLOYMENT CONTEXT

Under rule 56, any party may move for summary judgment. *See* Fed. R. Civ. P. 56(a) and (b). The moving party initially carries the burden of pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, although the moving party "need not affirmatively negate the nonmovant's claim in order to obtain summary judgment." *Allen v. Muskogee*, Oklahoma, 119 F.3d 837, 840 (10th Cir. 1997) (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 522 U.S. 1148, 118 S. Ct. 1165, 140 L. Ed. 2d 176 (1998)). Once the movant has met this burden, the nonmoving party must go beyond the pleadings and show that a genuine issue of material fact exists that would require a trial. The nonmoving party may not avoid summary judgment by resting upon only the allegations or denials in the pleadings. *See Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The Court must grant the motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In ruling on a summary judgment motion, the Court examines the factual record and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Allen v. Muskogee*, Oklahoma, 119 F.3d at 839-40. The Court's role in deciding a motion for summary judgment is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *See Aeolus v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995).

"The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-48 (emphasis in original). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248 (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, at 93-95 (1983)). If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-50.

A claim of intentional disparate treatment based on race can survive summary judgment only when the plaintiff has presented sufficient evidence to show that there is a genuine issue of material fact whether the plaintiff's race actually motivated the allegedly discriminatory conduct. *See Reeves*

v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("Liability depends on whether the protected trait... actually motivated the employer's decision."). "A plaintiff alleging discrimination on the basis of race may prove intentional discrimination through either direct evidence of discrimination (*e.g.*, oral or written statements on the part of a defendant showing a discriminatory motivation) or indirect (*i.e.*, circumstantial) evidence of discrimination." *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000) (citing *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529 (10th Cir. 1995)). In cases involving circumstantial evidence of discrimination, courts should apply the analysis that the Supreme Court of the United States set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1225.

Under the McDonnell Douglas framework, the plaintiff, here the EEOC, "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. "Once the plaintiff has established a prima facie case, 'the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason' for its employment action." *Kendrick v. Penske Transp. Services*, Inc., 220 F.3d at 1226 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802). "If the defendant makes this showing, the plaintiff must then show that the defendant's justification is pretextual." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804.

LEGAL ANALYSIS

The sole claim remaining in this case is the EEOC's allegation that BCI terminated Peters' employment because of his race. It is an "unlawful employment practice for an employer... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Both parties agree that this case does not involve direct evidence of discrimination and that the McDonnell Douglas analysis applies.[6]

BCI does not dispute that the EEOC has met its burden to establish a prima facie case of discriminatory discharge. And while the EEOC disputes whether BCI has come forward with a legitimate nondiscriminatory reason for its conduct, the Court believes that BCI's burden is one of production and not of persuasion. Thus, BCI need only articulate a legitimate nondiscriminatory reason for discharging Peters. The EEOC's arguments with respect to the legitimacy of BCI's proffered reason are more appropriately directed toward to the question of pretext. Because the Court finds that the EEOC has not created a genuine issue of material fact with respect to the question whether BCI's stated reason for its decision is mere pretext for discrimination, the Court will grant BCI's motion for summary judgment.

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[6] "In the absence of direct evidence of discrimination, a Title VII claimant may prove his case by inference." Response at 5. Both parties relied upon the McDonnell Douglas analysis in their briefs.

I. THE EEOC HAS ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATORY DISCHARGE.

In the United States Court of Appeals for the Tenth Circuit, a plaintiff must demonstrate four elements to establish a prima facie case of discriminatory discharge: (i) he belongs to a protected class; (ii) he was qualified for his job; (iii) despite his qualifications, he was discharged; and (iv) the job was not eliminated after his discharge. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1229 (citing *Perry v. Woodward*, 199 F.3d 1126, 1138 (10th Cir. 1999)). In this case, BCI does not dispute that the EEOC satisfies these four elements. *See* Memorandum in Support of Defendant's Motion for Summary Judgment at 16, filed February 19, 2004 (Doc. 66) ("BCI does not dispute that Plaintiff can establish a prima facie case of discriminatory discharge."). BCI's acknowledgment of a prima facie case means that, for purposes of this motion, the Court will accept the following elements of proof as true: (i) Peters was, at all relevant times, in a protected racial class; (ii) Peters was, at all relevant times, qualified for his position with BCI; (iii) despite Peters' qualifications, BCI discharged him; and (iv) BCI did not eliminate Peters' position after discharging him. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1229.

The Tenth Circuit has stated that, when a plaintiff establishes a prima facie case under the McDonnell Douglas analysis, he or she creates "a rebuttable presumption that [the] employer unlawfully discriminated against [the plaintiff]." *Perry v. Woodward*, 199 F.3d at 1138, n.9 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

> When viewed against a backdrop of historical workplace discrimination, an employee who belongs

> to a racial minority and who eliminates the two most common, legitimate reasons for termination, *i.e.*, lack of qualification or the elimination of the job, has at least raised an inference that the termination was based on a consideration of impermissible factors. The firing of a qualified minority employee raises the inference of discrimination because it is facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement.

Perry v. Woodward, 199 F.3d at 1140. Thus, in this case, the EEOC has created a rebuttable presumption that BCI discriminated against Peters by terminating his employment because of his race.

II. BCI HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY REASON FOR TERMINATING PETERS' EMPLOYMENT.

Once a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1226. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 142 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). BCI can meet this burden by offering admissible evidence sufficient for the trier of fact to conclude that it based its decision to terminate Peters' employment on a legitimate factor other than race. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 142 ("Respondent met this burden

by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records.").

BCI asserts that it terminated Peters' employment because of his insubordinate conduct toward Grado. *See* Memorandum in Support of Defendant's Motion for Summary Judgment at 16 ("BCI terminated Mr. Peters for insubordination."). "Insubordination could serve as a legitimate non-discriminatory reason for discharge to rebut the plaintiff's prima facie case." *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984) (citing *Ray v. Safeway Stores, Inc.*, 614 F.2d 729, 731 (10th Cir. 1980)). Thus, BCI has satisfied its burden to articulate a legitimate, nondiscriminatory reason for the employment action that it took with respect to Peters.

The EEOC contends that BCI's proffered reason for Peters' termination fails for several reasons: (I) Peters was not actually insubordinate; (ii) BCI's claim that the decision-maker did not know Peters' race is without merit; and (iii) substantial evidence exists that Grado, rather than Edgar, was the decision-maker behind Peters' termination. *See* Response at 8-18. These arguments, even if accurate, do not affect BCI's ability to meet its burden to set forth a legitimate, nondiscriminatory reason for its decision.

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's [termination]. The explanation provided must be

> legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 254-55 (internal citations and footnotes omitted). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253 (citations omitted). Accordingly, the Court believes that it is more appropriate to address the EEOC's arguments in a pretext analysis.

III. THE EEOC HAS NOT CREATED A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO THE ISSUE OF PRETEXT.

Once the employer articulates a legitimate, nondiscriminatory explanation for its decision, the presumption of discrimination disappears. *See id.* at 255 ("If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted[.]"). "The plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253. "A plaintiff establishes pretext by revealing 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.'" *Equal Employment Opportunity Commission v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1198 (10th Cir. 2000) (quoting *Bullington v.*

United Air Lines, Inc., 186 F.3d 1301, 1317 (10th Cir.1999)). The EEOC has raised several arguments in an effort to create a genuine issue of material fact concerning pretext.

Three of the EEOC's arguments were mentioned above: (i) Peters was not actually insubordinate; (ii) BCI's assertion that Edgar did not know Peters' race before making her decision is without merit; and (iii) substantial evidence exists that Grado, rather than Edgar, was the decision-maker behind Peters' termination. *See* Response at 8-18. In its briefing directly addressing the pretext issue, the EEOC also argued that: (i) BCI acted contrary to a written policy when it terminated Peters; (ii) BCI acted contrary to an unwritten company policy or practice by treating similarly situated individuals of a different class differently from Peters; (iii) evidence of Grado's racial bias supports a finding of pretext; and (iv) statistical evidence concerning the racial composition of BCI's work force supports a finding of pretext. *See id.* at 18. For the reasons stated on the record in open court during the hearing on this matter, and for the reasons set forth below, the Court finds that the EEOC has not demonstrated that there is a genuine issue of material fact that would require a trial.

A. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER BCI'S STATED REASON FOR TERMINATING PETERS' EMPLOYMENT IS FALSE.

The EEOC argues that BCI's proffered reason for terminating Peters' employment is a pretext for discrimination because Peters was, in fact, not insubordinate. The EEOC maintains that, to establish that Peters was insubordinate, BCI "must articulate an occasion when Stephen Peters resisted

authority, refused to obey, used objectionable language or was abusive toward a supervisor." Response at 8 (citing Webster's Third New Dictionary at 999 (1981); 48 Am. Jur. 2d Labor and Labor Relations § 2259). The EEOC contends that BCI is unable to articulate any of these conditions.

"District courts, when analyzing the pretext issue, do not sit as 'super-personnel departments' free to second-guess the business judgment of an employer." *Bullington v. United Airlines, Inc.*, 186 F.3d at 1318 n. 14, overruled in part on other grounds by *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). The relevant inquiry is not whether BCI's proffered reasons were "wise, fair or correct," but whether BCI "honestly believed those reasons and acted in good faith upon those beliefs." *Bullington v. United Airlines, Inc.*, 186 F.3d at 1318 (citing *Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir.1993) ("Title VII is not violated by the exercise of erroneous or even illogical business judgment."); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("Arguing about the accuracy of the employer's assessment [of plaintiff's performance] is a distraction, because the question is not whether the employer's reasons for a decision are right but whether the employer's description of its reasons is honest." (internal quotation marks and citations omitted.))). Further, "a challenge of pretext requires [the Court] to look at the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d at 1231.

Thus, in this case, Peters' subjective belief whether he committed insubordination is not relevant. The Court must analyze the pretext issue by determining whether a genuine issue of material fact exists whether BCI honestly believed that Peters had committed insubordination and whether that

was the true reason for its decision to terminate his employment. The EEOC has been unable to dispute, by competent evidence, that Patricia Edgar, the Employee Relations Manager responsible for deciding all termination issues, believed that Peters' conduct on Friday, standing alone, warranted termination. *See* Edgar Decl. ¶ 10, at 4 ("I made the determination on Friday, September 28, 2001, that Mr. Peters was insubordinate."). The EEOC has also been unable to point to evidence in the record which contradicts that Edgar made the decision to terminate because she believed that Peters' conduct met BCI's definition of insubordination. *See id.* ¶ 9, at 4 ("Insubordination occurs when the employee knows that he is considered to be defying a direct order of the supervisor and that his conduct could lead to termination."). It is BCI's definition of "insubordination" that controls. Although the EEOC argues for a different definition, Tenth Circuit law states that the Court must evaluate a pretext challenge by reference to "the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d at 1231.

And while the EEOC challenges BCI's ultimate conclusion that Peters was insubordinate, it does not challenge the facts underlying that conclusion. In fact, Peters admitted those facts at his deposition. Grado called Peters on Friday to discuss Peters coming in to work on Sunday and told Peters: "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." Peters Depo. at 121:11-14. Rather than agree to come in to work on Sunday, Peters told Grado to "do what [you've] got to do, and I'll do what I've got to do." *Id.* at 121:23 to 122:1. According to BCI, Peters' statement during that telephone conversation was an act of insubordination.

The EEOC argues that the Court should find a genuine issue of material fact with respect to pretext because it is unclear when Peters' insubordination, if any, occurred. According to the EEOC, Peters could not have committed insubordination on Friday, September 28, 2001 because Grado did not order him to take any action on Friday. The order from Grado required Peters to report to work on Sunday. The EEOC also argues that Peters did not commit insubordination on Sunday, September 30, 2001 because he stayed home from work with Katt's permission. The EEOC has not introduced evidence into the record, however, to contradict Edgar's stated reasons for the decision to terminate Peters' employment.

> By the end of the day Monday, October 1, 2001, I had made a final decision to terminate the employment of Stephen Peters. This decision was based on several factors. First and foremost was the conduct of Mr. Peters towards Mr. Grado on Friday, September 28, 2001. There was no question in my mind that Mr. Peters had committed the offense of insubordination that day. A single offense of insubordination is sufficient to warrant termination under BCI policy. However, this was not Mr. Peters' first offense of insubordination. The fact that Mr. Peters had previously been written up for insubordination and had already been given a final warning on this issue also contributed to my decision to terminate his employment. Mr. Peters had already been given more chances than the policy required on this issue, and I felt that any action short of termination at that juncture could set a bad precedent on the issue of BCI's stance with respect to insubordination.

Edgar Decl. ¶ 13, at 6.

Thus, while the EEOC argues that insubordination did not occur on Friday, the EEOC has not provided evidence to contradict BCI's evidence that Peters engaged in the conduct that BCI attributes to him. The EEOC's argument that BCI somehow misinterpreted that conduct is insufficient to create a genuine issue of material fact on the issue of pretext. "[A] challenge of pretext requires [the Court] to look at the facts as they appear to the person making the decision to terminate the plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d at 1231. There is no evidence to support the contention that BCI did not honestly believe that Peters was insubordinate on Friday.

The EEOC also argues that insubordination did not occur on Sunday because Peters missed work with Katt's permission. It is undisputed that Peters called in sick to Katt on Saturday evening. According to Edgar, however, that call did not justify Peters' absence or preclude a determination that Peters was insubordinate.

> The fact that Mr. Peters called in sick to Jeff Katt on Saturday night had no impact whatsoever on my assessment of the situation, for several reasons. First, in my opinion, the timing of Mr. Peters' alleged sickness was highly suspect. I knew that he worked his scheduled shifts on Friday, September 28, 2001 and Monday, October 1, 2001, which led me to conclude he could have come to work on Sunday if he wished to do so. I also found it particularly suspicious that Mr. Peters chose to call in sick to Mr. Katt, rather than Mr. Grado, given the fact that Mr. Peters had been warned by Mr. Grado the day before that if he did not come to work he would be subject to termination. In my opinion, which I formulated prior to my decision to terminate, if Mr. Peters had

> genuinely been sick, and unable to work, and was genuinely interested in preserving his employment relationship with BCI, he would have called in to explain the situation directly to Mr. Grado.

Edgar Decl. ¶ 14, at 6-7. Thus, reference to Peters' Saturday evening telephone call to Katt does not create a genuine issue of material fact whether Edgar believed Peters was insubordinate on Sunday.

The EEOC argues that the Disciplinary Status Notice creates a genuine issue of material fact whether BCI terminated Peters for failure to report to work on Sunday rather than for his conduct toward Grado on Friday. The Notice shows a violation date of September 30, 2001 and contains the following narrative:

> Group A: Insubordination: On Friday 9-28-01 you were given a direct order to come into work on Sunday 9-30-01 due to business necessity. I also explained how this was a direct order and failure to comply with the directive would be considered insubordination and would result in termination. You explained how you had plans and that I "should do whatever I had to do." You did not report to work on Sunday 9-30-01, therefore your employment is being terminated for insubordination.

Disciplinary Status Notice (September 30, 2001). Although the Notice mentions Peters' failure to report to work on Sunday, September 30, 2001, the Court does not believe that it creates a genuine issue of material fact on the issue of pretext. It is consistent with Edgar's declaration.

Edgar has stated that Peters' failure to report to work played a role in her decision to terminate Peters' employment. *See* Edgar Decl. ¶ 14, at 6. Edgar viewed Peters' "failure to come to work on Sunday not as an isolated attendance issue, but as the fulfillment of his stated intention the previous Friday to defy Mr. Grado's direct order." *Id.* Edgar viewed Peters' conduct on Friday and Sunday as parts of the same chain of events. Thus, that the Notice lists Peters' conduct on Sunday, September 30, 2001 as the reason for his termination is not inconsistent with BCI's stated position and does not create a genuine issue of material fact.[7]

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[7] The EEOC's characterization of Peters' termination as one for failure to report to work serves as the basis for its later argument that BCI treated Peters differently than other similarly situated individuals. The EEOC has not been able to dispute, however, that BCI terminated Peters' employment because of insubordination rather than attendance violations. *See* Edgar Decl. P 16, at 7 ("Mr. Peters was terminated solely for insubordination. Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday, September 28, 2001, as the fulfillment of Mr. Peters stated intention to defy a direct order from Mr. Grado."). The fact that Grado's order to Peters involved coming into work does not automatically transform Peters' violation from insubordination into an attendance violation; the attendance violation was incidental to Peters' insubordination. Thus, Peters is not similarly situated with other employees whom BCI disciplined for violation of various attendance rules.

B. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER GRADO, RATHER THAN EDGAR, MADE THE DECISION TO TERMINATE PETERS' EMPLOYMENT.

The parties dispute whether Edgar or Grado made the decision to terminate Peters' employment. The EEOC argues that "Edgar relied on 'facts' obtained from Grado. Based on the 'facts' as reported by Grado, Edgar **authorized** Grado to terminate Mr. Peters." Response at 15 (emphasis in original). In support of its argument that Grado was the decision-maker, the EEOC also points out that it was Grado that anticipated a decision needed to be made and contacted Edgar; that Edgar did not conduct an independent investigation of the facts she received from Grado; and that Grado gave employees the impression that he had the authority to make termination decisions.

The EEOC argues that Edgar unduly relied on Grado's version of the facts because she did not perform an independent investigation into Peters' conduct. There was no evidence, however, either before Edgar or before this Court, to raise the inference that Grado relayed misleading information to Edgar. To the contrary, the evidence is that Peters engaged in the conduct that BCI attributes to him.

Moreover, Edgar did take some steps to more closely evaluate the situation. She met with Pedersen by telephone to learn more information about Peters' disciplinary history. It was during that conversation that she learned that one of Peters' former supervisors had written Peters up for insubordination in 1999 based on his refusal to work a scheduled day off. *See* Edgar Decl. ¶ 11, at 5. That Peters had a similar incident with a different supervisor contributed

to Edgar's conclusion that Grado's version of events was accurate. *See id.*

The EEOC produced evidence that Grado made representations in the workplace that he had the authority to terminate employees under his supervision. *See* Katt Depo. at 72:7-13. During his employment with BCI, Katt assumed that Grado was the one who made decisions to terminate employees. *See id.* at 71:21 to 72:5. Other employees also believed that Grado had the ability to fire the individuals he supervised. *See* Wilson Aff. ¶ 8, at 2-3. Peters also testified that he believed Grado had the authority to discipline and fire employees. *See* Peters Aff. ¶ 18, at 3.

Grado's statements, however, and employees' subjective beliefs, do not create a genuine issue of material fact whether Grado had the authority to terminate employees. With respect to Grado's actual authority, the evidence is undisputed. Edgar had to authorize "*all* terminations." Edgar Decl. ¶ 3, at 2 (emphasis in original). *See also* Pedersen Decl. ¶ 2, at 2. Grado did not have independent authority to discipline or terminate employees working under his supervision. *See* Grado Decl. ¶ 6, at 3 ("All such disciplinary actions must be authorized by our Human Resources Department. It is my responsibility to deliver or communicate all disciplinary actions -- whether verbal or written -- to employees working under my supervision."). When an employee had an attendance, performance, or disciplinary issue, Grado brought those facts to the attention of the Human Resources Department, which would in turn decide which company

polices applied to the situation and the appropriate action to take under the circumstances. *See id.*[8]

BCI has produced admissible evidence that Edgar was the final decision making authority on terminations generally. *See* Edgar Decl. ¶ 3, at 2; Pedersen Decl. ¶ 2, at 2. It has also produced competent evidence that Edgar was the decision-maker specifically with respect to Peters' termination. *See* Edgar Decl. ¶ 15, at 7 ("I was solely responsible for making the decision to terminate Mr. Peters' employment. At no point during my meetings with Mr. Grado did I ask -- or did Mr. Grado offer -- an opinion or recommendation as to what should be done with Mr. Peters."). *See also* Grado Decl. ¶ 13, at 5 ("During these conversations, I simply reported the facts to Ms. Edgar and gave no opinion or recommendation as to what I thought should happen to Mr. Peters.").

In response to the evidence that Edgar, rather than Grado, made the final decision to terminate Peters' employment, the EEOC argues that "a defendant may be held liable if the manager who discharged the plaintiff merely acted as a rubber stamp, or the 'cat's paw,' for a subordinate employee's prejudice, even if the manager lacked discriminatory intent."

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[8] The EEOC also brings Grado's training in discipline to the Court's attention. *See* Response at 16 n.3 ("Moreover, Cesar Grado was required to attend training on "*discipline and dismissal decisions,*" and a supervisor's "*role in discipline.*") (emphasis in original). That Grado participated in such training, however, does not create a genuine issue of material fact whether Grado was the decision-maker behind Peters' termination. It is logical that Grado would attend such training because he is the supervisor who must use professional judgment in determining whether to bring certain conduct to the Human Resources Department's attention.

Kendrick v. Penske Transp. Services, Inc., 220 F.3d at 1231.[9] Edgar, however, did not act as a "rubber stamp" or "cat's paw" for Grado's prejudice. The EEOC does not dispute with any competent evidence that Grado did not express an opinion or recommendation to Edgar about what he thought BCI should do about Peters. *See* Grado Decl. ¶ 13, at 5.

Cases in which other circuits have recognized this "rubber stamp" theory involved situations in which a decision-maker accepted the *recommendations* of a biased supervisor without conducting an independent investigation. *See e.g., Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) ("If, on the other hand, Aguero did not conduct his own independent investigation, and instead merely 'rubber stamped' the recommendations of Clark and Kelley, the causal link between Long and Reavis's protected activities and their subsequent terminations would remain intact."); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990)("Lehnst not only set up Shager to fail by assigning him an unpromising territory but influenced the committee's deliberations by portraying Shager's performance to the committee in the worst possible light. Lehnst's influence may well have been decisive. The committee's deliberations on the question whether to fire Shager were brief, perhaps perfunctory; no member who was deposed could remember having considered the issue."). In this case, Grado did not make any

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[9] Although the EEOC cites *Kendrick v. Penske Transp. Services, Inc.* for this proposition, the Court notes that *Kendrick* does not say that the Tenth Circuit accepts that test. It only says that "other circuits have recognized" that test and then explains why it failed to assist the plaintiff in *Kendrick*. Similarly, while this Court does not decide the appropriateness of the test, it does not believe that the test assists the EEOC in establishing a genuine issue of material fact on pretext.

recommendations to Edgar. Furthermore, Edgar attempted to do at least some independent investigation by consulting with Pedersen regarding Peters' disciplinary history.

Even if the Court were to analyze this case under the "rubber stamp" theory, the EEOC has not directed the Court's attention to any evidence in the record linking Grado's potential bias to his decision to involve Edgar in the situation with Peters. The EEOC has not presented evidence that Grado would not have called Edgar if Peters was Anglo or Hispanic. It is undisputed that Grado believed he needed to consult Human Resources and that Pedersen was unavailable.

The only arguably similar incident involved another merchandiser, Monica Lovato, not reporting to work on a day off as requested. *See* Katt Depo. at 118:1 to 119:23. Because that situation was different in two significant ways, the Court does not believe that Grado's failure to contact Human Resources in Lovato's situation supports an inference that he makes such decisions based on the employee's race. First, unlike Peters, Lovato did not refuse to work the day off as requested, but rather agreed to work and then failed to report to work. Second, once Lovato failed to report to work, her violation was an attendance violation rather than insubordination.

Evidence of Grado's racial bias and comments, standing alone, is insufficient to support an inference that he made the decision to contact Edgar because of Peters' race. Although the Court finds that Grado was not the decision-maker in this case, case law discussing racial bias on the part of a decision-maker is informative on this area of proof. "Although [racial] comments may serve as circumstantial evidence of discrimination, the plaintiff must still show some nexus

between the statements and the defendant's decision to terminate the employee. Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Shorter v. ICG Holdings, Inc.*, 188 F.3d at 1209-10 (citations and internal quotation marks omitted). Thus, if the EEOC were attempting to show that Grado improperly influenced or initiated Peters' termination, it would need to demonstrate some causal connection between his racial bias and his decision to involve Edgar. The EEOC has not presented such evidence.

Finally, the EEOC argues that there is a genuine issue of material fact whether Grado was the decision-maker because the Disciplinary Status Notice BCI issued to Peters at the time of his termination does not identify Edgar as the decision-maker, and BCI did not identify Edgar as the decision-maker during administrative proceedings. The Court does not believe that these omissions create a genuine issue of material fact whether Grado was the decision-maker because they are not inconsistent with the evidence BCI has produced in favor of summary judgment. Grado stated that it is his responsibility to "deliver or communicate all disciplinary actions... to employees working under [his] supervision." Grado Decl. ¶ 6, at 3.

C. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER PETERS' RACE PLAYED A ROLE IN THE DECISION TO TERMINATE HIS EMPLOYMENT.

Grado knew that Peters was African American. Because the Court has found, however, that the record shows that Grado did not make the decision to terminate Peters' employment, it is necessary to examine whether the actual decision-maker knew of Peters' race and possessed any

racially discriminatory motivation. The EEOC raises two arguments in an effort to create a genuine issue of material fact on this issue. First, the EEOC argues that Edgar had knowledge of Peters' race because she had access to documents containing that information. Second, the EEOC argues that other BCI management officials who acted in concert with Edgar had knowledge that Peters is African American.

Neither of the EEOC's arguments assumes that Edgar had actual knowledge of Peters' race. The EEOC's first argument attempts to impute knowledge to Edgar because she had the ability to discover the information if she chose to do so. The EEOC contends that documents disclosing Peters' race were available to Edgar through Peters' personnel file, which Pedersen reviewed in Albuquerque and discussed with Edgar. These documents, however, were located in Albuquerque, not Phoenix. The EEOC also asserts that Edgar also could have learned of Peters' race by accessing information that BCI maintains as part of its Human Resources management.

The EEOC's argument does not create a genuine issue of material fact because, although it establishes that Edgar had the opportunity to learn Peters' race, there is no evidence that she availed herself of that opportunity. It is undisputed that Edgar worked in Phoenix, rather in than Albuquerque, and that she did not meet Peters before she made the decision to terminate him. *See* Edgar Decl. ¶ 18, at 8. Her communications with Grado and Pedersen were all by telephone. Further, there is no evidence to contradict Edgar's sworn testimony that she did not know that Peters was African American until after the termination. *See id.* ¶ 17-18, at 7-8 ("Race played no part whatsoever in my decision to terminate the employment of Stephen Peters. I did not even know he was African American when I made the decision to

terminate his employment."). She was not present when Grado told Peters that BCI had terminated him.

The EEOC's second argument also does not create a genuine issue of material fact that BCI's stated reason for terminating Peters' employment was pretextual. The EEOC points out that other BCI management officials in Albuquerque, who were directly involved in Peters' termination, were aware that he is African American, Grado, Pedersen, and Bateluna were each present during the meeting when Grado informed Peters of the termination. The EEOC contends that each of those three people knew that Peters was African American. The Court cannot attribute this knowledge to Edgar, however, because there is no evidence that any of those three people conveyed their knowledge of Peters' race to Edgar. Edgar's sworn testimony is that she did not know Peters' race.

Pedersen testified that she did not realize that Peters was African American until he entered the meeting where Grado announced the termination. *See* Pedersen Decl. ¶¶ 9-10, at 3. There is no evidence to contradict that assertion. If Pedersen learned of Peters' race at the time of the termination, there was no basis for her to attempt to change Edgar's decision merely because of Peters' race. Edgar made the decision based on other factors and any new information concerning race was irrelevant.

The EEOC also argues that Grado's knowledge of Peters' race creates a genuine issue of material fact on pretext. Grado was the supervisor who decided to seek guidance from Edgar on Friday, September 28, 2001. The EEOC contends that this decision was the "first and most critical decision made concerning Peters' termination." Response at 15. The Court assumes that the EEOC believes Grado's decision to

involve Edgar was critical because the EEOC also argues that Grado was biased against African Americans. According to the EEOC, it was this alleged racial bias that motivated Grado to initiate the process of Peters' termination.

The Court believes that the EEOC has created a genuine issue of fact whether Grado was biased against African Americans. It has introduced the affidavits of several employees, including Peters, who believe that Grado treated African Americans less favorably than he treated employees of other races. The Court does not believe, however, that this issue is material. The record shows that Edgar, not Grado, made the determination that Peters was insubordinate and was the decision-maker behind Peters' termination. There is no evidence that Grado communicated his racial bias to Edgar. Edgar did not know that Peters was African American and did not receive any recommendation from Grado as to how to discipline Peters. Furthermore, there is no evidence that the information Grado communicated to Edgar, and on which Edgar relied to make her decision, was false.

Accordingly, the Court does not believe that Grado's, Pedersen's, and Bateluna's knowledge of Peters' race creates a genuine issue of material fact whether BCI's stated reason for terminating Peters' employment was a pretext for discrimination. Also, the EEOC has not created a genuine issue of material fact whether Edgar knew Peters' race. Aside from the arguments of counsel, there is nothing before the Court to support the inference that Edgar knew Peters is African American.[10] If the Court were to allow this case to

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[10] The EEOC also argues that statistical evidence concerning the racial composition of BCI's work force supports a finding of pretext. In April 2002, only three of the 200 employees in BCI's

proceed to a jury, and the evidence was what it is in the record, the Court would still be confronted with a situation in which the decision-maker did not know the race of the employee.

D. NO GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER BCI ACTED CONTRARY TO AN UNWRITTEN COMPANY POLICY BY TREATING SIMILARLY SITUATED INDIVIDUALS DIFFERENTLY THAN IT TREATED PETERS.[11]

The EEOC also argues that the Court should find a genuine issue of material fact on the issue of pretext because BCI treated Peters differently than other similarly situated individuals of different racial classes. "An employee is similarly situated to the plaintiff if the employee deals with the same supervisor and is subject to the 'same standards governing performance evaluation and discipline.'" *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d at 1232 (quoting

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Albuquerque facility were African American. *See* Current Albuquerque Employee Roll (dated April 24, 2002). The Court does not believe that this fact, under the circumstances present in this case, is sufficient to create a genuine issue of material fact on the issue of pretext, and the EEOC does not explain how it does.

[11] The EEOC also alleges that BCI acted contrary to its written policies when it terminated Peters' employment. For example, BCI did not provide Peters with an exit interview after his termination. This fact, however, does not create a genuine issue of material fact whether BCI's stated reason for the termination was pretextual. Edgar made the decision to terminate Peters' employment without knowledge of his race. The lack of an exit interview does not change that undisputed fact.

Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997)). "The burden is on the plaintiff to demonstrate he is similarly situated to the employees to whom he is comparing himself." *Kelley v. Goodyear Tire and Rubber Co.*, 220 F.3d 1174, 1178 (10th Cir. 2000) (citing *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 532 (10th Cir. 1994)).

The EEOC identifies four individuals that it alleges committed rule violations of comparable seriousness to Peters: (i) Arturo Lopez; (ii) Monica Lovato; (iii) Damian Mirabal; and (iv) Oran Sage. With respect to each individual, however, there is some differentiating or mitigating circumstance that distinguishes him or her from Peters. For example, Sage was not a merchandiser and did not report to Grado. Sage failed to follow his supervisor's order to reload his truck and take out a delivery, then left the premises without his supervisor's permission. *See* Pedersen Decl. ¶ 15, at 5. Pedersen determined that, although Sage had violated company policy, he had not committed insubordination because there was no evidence to suggest that his supervisor had told him that his conduct was insubordination and could lead to termination. *See id.* Accordingly, Pedersen gave Sage a written warning for a Group B violation and suspended him without pay for three days. *See id.*

Damian Mirabal had attendance and work performance issues. Mirabal received progressive discipline addressing these Group C violations, and BCI ultimately terminated him for unsatisfactory performance. *See id.* ¶ 13, at 4. Mirabal did not refuse to obey a direct order, and Grado did not tell Mirabal that his conduct was insubordinate. *See* Grado Decl. ¶ 17, at 7. Other than Peters, Grado states that he has "never had a situation where an employee refused a direct order, and, after being told his conduct was insubordinate and that

he could be fired, told [him] to 'do what [he has] to do.'" *Id.* ¶ 18, at 7.

Like Mirabal, Lopez also had performance and attendance issues, and also received progressive discipline. *See id.* ¶ 17, at 6-7. There was one incident involving Lopez that the EEOC argues is comparable to Peters' situation. On Lopez' last day of employment with BCI, he refused to return pages both from Katt and from Grado. Grado then sent Lopez a text message telling him that if he refused to return the page he may be terminated. *See id.* ¶ 19, at 7. Lopez did not return the page, but also did not return to work at BCI. *See id.* Thus, because Lopez was no longer with the company, Grado did not bring his insubordination to Pedersen's or Edgar's attention. *See id.* And, if Lopez had returned to work, Grado would have reported his behavior just as he did in Peters' case. *See id.*

Lovato's conduct also involves attendance violations rather than insubordination. She did not have any disciplinary problems during her employment. *See* Pedersen Decl. ¶ 14, at 5. She did not refuse a direct order from Grado, and Grado did not tell her that her conduct was insubordinate and could lead to termination. *See* Grado Decl. ¶ 20, at 8. Any rule violations that Lovato may have committed were attendance violations that were not subject to immediate termination.

These individuals are not similarly situated to Peters because they all committed attendance violations. Peters, on the other hand, did not.

Mr. Peters was terminated solely for insubordination.
Mr. Peters was not terminated for performance issues.
Mr. Peters was not terminated for attendance

> violations. Mr. Peters was not terminated because he called in sick to Mr. Katt instead of Mr. Grado. Mr. Peters was not terminated because he did not show up for work on Sunday, except to the extent this conduct is viewed in context with his exchange with Mr. Grado on Friday, September 28, 2001, as the fulfillment of Mr. Peters' stated intention to defy a direct order from Mr. Grado.

Edgar Decl. ¶ 16, at 7. Because the conduct of the other employees did not rise to the level of insubordination, the EEOC cannot compare their conduct with that of Peters. Accordingly, the Court finds that the EEOC has not established that a genuine issue of material fact exists with respect to pretext, and the Court will grant BCI's motion for summary judgment.[12]

CONCLUSION

Although there is evidence in the record that Grado may have harbored racial bias against African Americans, there is no evidence to suggest that such bias influenced Edgar's decision to terminate Peters' employment. The EEOC has not presented evidence to suggest that Grado would not have contacted Edgar regarding the situation if Peters had been Anglo or Hispanic. Grado relayed accurate information to Edgar about Peters' conduct, and Edgar then independently made the decision to terminate Peters without any recommendation from Grado. And while Grado may have

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[12] Because the Court finds that there is no genuine issue of material fact whether BCI intentionally discriminated against Peters on the basis of his race, it is unnecessary to address the EEOC's request for injunctive relief.

had the authority to recommend discipline, the undisputed evidence in the record is that he did not make any recommendations to Edgar. In addition to the information she received from Grado, Edgar's decision included consideration of Peters' 1999 incident of insubordination with a different supervisor. Edgar did not know that Peters was African American at the time she made the decision to terminate him. Accordingly, there is no evidence that racial animus motivated BCI's termination of Peters.

IT IS ORDERED that the Defendant's Motion for Summary Judgment is granted and all claims against BCI are dismissed with prejudice.

Dated: 6/10/2004

/s/_____
James O. Browning
UNITED STATES DISTRICT JUDGE